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No. _____

In The

Supreme Court of the United States

NEW YORK STATE ASSEMBLY MEMBER, RICHARD L. BRODSKY,
Petitioner,

v.

GOVERNOR GEORGE E. PATAKI, CHAIRMAN OF THE PUBLIC SERVICE COMMISSION, MAUREEN O. HELMER, COMMISSIONERS OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION, THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD D. WEISS AND NEAL N. GALVIN, NEW YORK STATE ASSEMBLY SPEAKER, SHELDON SILVER, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI OF PETITIONER RICHARD L. BRODSKY

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QUESTIONS PRESENTED

1. **Should the Supreme Court settle the conflict and clarify the confusion among the Circuits with regard to the proper legal test to be applied in bill of attainder cases?**

2. **Should the Bill of Attainder provisions of the Constitution be used to undercut the well-settled and effective powers of States in the fields of economic regulation and utility ratemaking?**

3. **Should Bill of Attainder Clause be extended, for the first time, to other than natural persons, specifically to regulated monopolies?**

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A to the petition and is reported at 292 F.3d 338 (N.D.N.Y. 2000). The opinion of the District Court for the Northern District of New York appears at Appendix B to the petition and is reported at 117 F.Supp.2d 257 (2nd Cir. 2002).

JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit decided the case was June 5, 2002. No petition for rehearing was timely filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l). This petition is timely filed within ninety days of entry of the June 5, 2002 judgment of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bill of Attainder Clause of Article I, Section 10 of the United States Constitution.

Chapter 190 of the Laws of 2000.

N.Y. Transportation Corp. Law § 11 (McKinney 2000).

STATEMENT OF THE CASE

This case concerns the unprecedented striking down of a state statute that set a utility rate on the grounds it is an unconstitutional bill of attainder.

The petition seeks review of the Second Circuit Court of Appeals' decision affirming in part a District Court decision that held that New York's Chapter 190 of the Laws of 2000 ("Chapter 190") was an unconstitutional bill of attainder. *See* Appendix D.

Chapter 190 was passed by the Legislature and signed by the Governor in response to the negligent operation of the Indian Point II nuclear power facility by Consolidated Edison ("Con Edison"), which caused a release of radiation and shut down of the plant on February 15, 2000. Chapter 190 prohibited Con Edison from charging its customers the estimated $250 million in additional costs required to replace the power previously produced at Indian Point. After an appropriate legislative investigation Chapter 190 was passed by both the New York State Assembly and the New York State Senate and signed into law on August 8, 2000.

The facts which prompted the Legislature to enact Chapter 190 date back at least to 1974. That year, Con Edison put Indian Point II into service using Model 44 steam generators. In 1981, Con Edison and eight other utilities sued Westinghouse, the manufacturer of the Model 44 generators alleging them to be defective and subject to leaks, which would progressively degrade over time. As a result of the litigation, Con Edison and the other utilities received replacement generators in 1988. Unlike every other utility, Con Ed knowingly refused to replace the defective generators, placing them into on-site storage.

Con Edison continued to operate the original Model 44 steam generators it knew and alleged to be defective

between 1988 and 2000, choosing to perform repairs on leaking and cracked tubes on numerous occasions, rather than replace the generators. On February 15, 2000, a tube rupture did occur, causing a radiation release and an emergency shutdown of Indian Point II. As a result of that emergency shutdown, Con Edison purchased replacement power to provide to their customers. The additional cost of the replacement power was estimated at $600,000 per day, for a total in excess of $250 million.

In 1997 the Public Service Commission ("PSC") allowed Con Edison to employ a rate recovery mechanism that includes a monthly fuel adjustment clause ("FAC"). Con Edison's FAC included a specific provision limiting its share of the cost of replacing Indian Point II power in the event of an outage. Con Edison is the only utility in New York operating a nuclear power plant that has the benefit of a FAC that specifically shields the utility from the costs of a nuclear outage, and initially allows these additional replacement power costs to be directly passed to ratepayers without PSC review.

In its continuing exercise of its plenary authority to regulate utilities and set rates, on November 10, 1999 the Assembly conducted a Hearing on safety and economic issues relating to Indian Point II and other facilities. Following the February 15th outage, the Assembly reconvened the Hearing on March 3, 2000. The Con Edison Chief Operating Officer and other Con Edison employees were invited to and did give sworn testimony with respect to the outage, the use of the FAC, and other relevant matters. Con Edison was asked to submit written responses to questions that it failed to answer at the Hearing. Shortly after the Hearing, three Members of the New York State Assembly followed up by letter with Con Edison, again requesting Con Edison's responses to the Assembly's additional questions. Thirty-eight days later, Con Edison submitted a written response.

The Legislature, in light of its investigative Hearings and other information it obtained, found that Con Edison had knowingly operated Indian Point in an improper manner, causing the increase in costs to ratepayers. It further determined that, in the context of an overall rate that was just and reasonable, the costs of the outage should be borne by the Company rather than innocent ratepayers, stating in the Legislative Findings

> The operator of a nuclear generating facility has a high duty of care to protect the health, safety and economic interests of its customers. Rate regulation of nuclear operators should discourage the taking of risks with regard to potential threats to public health and safety.
>
> By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers. Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.

The Governor, prior to signing the legislation that would become Chapter 190, concluded that

> based upon the evidence that has been adduced to date, it is clear that Con Edison's maintenance and inspection practices at the Indian Point 2 facility were flawed and that Con Edison continued to operate steam generators at the facility well past the point when it was safe to do so. . . . The factual record that has been developed to date paints a compelling picture of questionable management decisions and requires immediate intervention to protect Con Edison's ratepayers from bearing the cost of these decisions.
>
> Memorandum of Governor George E. Pataki (August 8, 2000).

Following passage of Chapter 190, Con Edison filed a complaint in the U.S. District Court against Governor George Pataki and certain PSC officials on August 14, 2000. Petitioners, New York State Assembly Members later joined the action as Intervenor-Defendants as authorized by Order dated September 6, 2000.

In its complaint, Con Edison challenged the constitutionality of Chapter 190 and sought a preliminary and permanent injunction. Con Edison claimed that Chapter 190 violated its right to equal protection under the Fourteenth Amendment; constituted an unlawful bill of attainder in violation of Article I, § 10 of the U.S. Constitution; violated its Fourteenth Amendment right to procedural due process; impaired its contractual rights under Article 1, § 10 of the U.S. Constitution; was an unjust taking under the Fourteenth Amendment; violated 42 U.S.C. § 1983; and violated the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2).

By Decision and Order dated October 10, 2000, the District Court found that Chapter 190 was unconstitutional because it violated the Equal Protection Clause and constituted an unlawful bill of attainder. *Con Ed v. Pataki*, 117 F.Supp.2d 257 (N.D.N.Y. 2000).

A timely notice of appeal was filed to the Second Circuit Court of Appeals seeking the reversal of the District Court decision.

Oral arguments were held by the Second Circuit on May 21, 2001. By Decision dated June 5, 2002, the Second Circuit Court of Appeals affirmed the judgment of the District Court. Judge Walker noted in his decision that it was based solely on Con Ed's bill of attainder claim, and that the Circuit Court was "skeptical, however, that the [Equal Protection] Clause would require invalidation of Chapter 190." *Con Ed v. Pataki, et al.*, 292 F.3d 338, 346 n. 2 (2nd Cir. 2002). The case was remanded to the District Court to correct a scrivener's error in judgment.

In its decision the Second Circuit made a threshold determination that corporations enjoy the constitutional protection of the Bill of Attainder Clause, stating that for "several reasons, we think the protection afforded by the Bill of Attainder Clauses is not a 'purely personal guarantee' and therefore, is one of the constitutional rights enjoyed by corporations." *Con Ed*, 292 F.3d at 347. The opinion states that it is not a "purely personal guarantee" because "[w]hen a corporation suffers an economic injury its shareholders suffer the same economic injury." *Con Ed*, 292 F.3d at 348. Thus, the Second Circuit held that "corporations must be considered 'individuals,' . . . that may not be singled out for punishment under the Bill of Attainder Clause." *Citation omitted*. *Con Ed*, 292 F.3d at 349 *citing Nixon*, 433 U.S. at 468.

The Second Circuit then set forth and applied the three-pronged test established by this Court to determine if a statute is a bill of attainder, to wit: whether the act: (1) "determines guilt and inflicts punishment"; (2) "upon an identifiable individual"; and (3) is "without provision of the protections of a judicial trial." *Con Ed*, 292 F.3d at 346 *citing Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977). "[T]hose factors are the evidence that is weighted together in resolving a bill of attainder claim." *Con Ed*, 292 F.3d at 350 *citing Nixon*, 433 U.S. at 473-78.

With respect to factors (2) and (3), the Second Circuit concluded, per its threshold determination, that Con Ed is an "individual," and that "[i]n the present case, the lack of a judicial trial is incontrovertible." *Con Ed*, 292 F.3d at 346.

The Second Circuit then considered the remaining prong, (1) "punishment," which is itself subject to a three part inquiry: (a) the historical test (whether the statute falls within the "historical meaning of legislative punishment"); (b) the functional test (whether the statute, "reasonably can be said to further non-punitive legislative purposes"); and (c) the motivational test (whether the legislative record "evinces a congressional intent to punish"). *Con Ed*, 292 F.

3d at 350 *citing Selective Service System v. Minnesota Public Interest Research Group et al.*, 468 U.S. 841, 852 (1984).

Under (a), the historical test, the Second Circuit recognized that Chapter 190 did not assess a fine or disability and that this Court has held that an adverse utility-rate decision is not "confiscatory." The Second Circuit conceded that Chapter 190 did not fall within the historical meaning of legislative punishment, holding however, "[a] statute need not fit within the historical category of punishment to be considered such." *Con Ed*, 292 F.3d at 351.

Under (b), the functional test, the Second Circuit found numerous non-punitive legislative purposes. "By preventing Con Ed from passing through the costs associated with the IP2 outage that it would not have incurred ordinarily, the legislature prevented Con Ed's ratepayers from being forced to bear the costs that the legislature viewed as negligently incurred. . . . This is not necessarily a punitive purpose." *Con Ed*, 292 F.3d at 352. "Chapter 190 also functions to deter similar conduct by Con Ed and other public utilities in the future." On the other hand, the Second Circuit found that even though Chapter 190 contained legitimate non-punitive reasons, "eliminating harm to innocent third parties is a purpose consistent with punishment," and that "general and specific deterrence are also traditional justifications for punishments." *Con Ed*, 292 F.3d at 352–53. The Second Circuit concluded that it could "discern no wholly non-punitive purpose to justify the entire cost-allocation prohibition in Chapter 190." *Con Ed*, 292 F.3d at 351, 352-54. The Second Circuit then set forth its opinion that "[n]either of the legitimate purposes set out above – prevention of harm to ratepayers and deterrence of inefficient, monopolistic conduct – can justify preventing Con Ed from passing these costs along to ratepayers." *Con Ed*, 292 F.3d at 353-54.

Under (c), the motivational test, the Second Circuit sought to determine if the legislative record evinces a

legislative intent to punish, indicating that "[o]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]" *Con Ed*, 292 F.3d at 354 *citing Flemming v. Nestor* 363 U.S. 603, 617 (1960). The "[s]tatements by a smattering of legislators 'do not constitute [the required] unmistakable evidence of punitive intent.'" *Con Ed* 292 F.3d at 354 *citing Selective Serv. Sys.*, 468 U.S. at 856, n. 15. The Second Circuit referred to two statements made by Senators in floor debate, and said, "the evidence of punitive intent in the legislative record in this case *is insufficient on its own* to justify a conclusion that Chapter 190 is punitive." *Emphasis added. Con Ed*, 292 F.3d at 354–55. "But the stated intent of at least some legislators . . . to punish Con Ed reinforces our *independent conclusion* that a substantial part of the legislation cannot be justified by any legislative purpose but punishment." *Emphasis added. Con Ed*, 292 F.3d at 355.

Having made the above determinations the Second Circuit, referring to some of the language in *Nixon*, made an additional inquiry and determination, the "less burdensome alternative" test. The Second Circuit stated that because Chapter 190 disallowed certain costs that it believed should be recovered by Con Edison, "there are plainly 'less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives,'" and used that determination to justify overturning Chapter 190 as a Bill of Attainder. *Con Ed*, 292 F.3d at 354.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH DECISION OF THE D.C. CIRCUIT, AND CONFLICTS WITH THE LEGAL TEST USED BY THE FIFTH AND SEVENTH CIRCUITS AND THIS COURT IN BILL OF ATTAINDER CASES, AND IF UPHELD WILL UNDERMINE THE ABILITY OF STATES TO RESTRAIN CORPORATE WRONGDOING AND REGULATE MONOPOLIES.

One significant reason for granting a certiorari petition is the existence of a conflict among the Circuits with respect to the law applied to a particular case. There is, in this case, such a conflict among the four Circuits which have decided cases seeking application of Bill of Attainder Clause protections to corporations. The Second Circuit took language from this Court's decision in *Nixon* suggesting that the existence of a "less burdensome alternative" might be of significance to the outcome of that particular case, and applied it to the legislative remedy existing in Chapter 190, thereby invalidating the statute. The D.C. Circuit, on the other hand, explicitly refused to engage in any judicial inquiry into the availability of alternative methods of achieving the legislative goal. "In other words, *it does not matter* that Congress arguably could have enacted different legislation." *Emphasis added. Bellsouth Communications v. Federal Communications Comm'n*, 162 F.3d 678, 689 (D.C. Cir. 1998)("*Bellsouth II*"); *Citing BellSouth v. FCC*, 144 F.3d 58 (D.C. Cir. 1998)("*BellSouth I*"). *See also Navegar, Inc. v. United* States, 192 F.3d 1050, 1068 (D.C. Cir. 1999). ("Therefore, since the prohibition effectuated by the act ... exhibits a purely punitive purpose ... it does not constitute an unconstitutional bill of attainder.") This is a conflict between the Circuits of a kind that this Court has resolved, and in this case should resolve.

The Fifth and Seventh Circuits did not explicitly reject the "less burdensome alternative" inquiry, but did not apply it in reaching their decisions, and rejected Bill of Attainder Clause claims made by the corporate plaintiffs before them.[1]

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[1] *Nixon*, 433 U.S. at 468; *SBC Communications,*, 154 F.3d at 242; *Bellsouth II*, 162 F.3d at 684; *Selective Servc. Sys.*, 468 U.S. at 852.

The Seventh Circuit ruled on other constitutional grounds, but stated, "The requirement of punishment is most clearly satisfied when a punitive purpose is conjoined with a characteristically punitive sanction, such as a fine." *Club Misty*, 208 F.3d at 617 *Internal citations omitted.*

The Second Circuit, unable to invalidate Chapter 190 as a bill of attainder using the correct test, added a new and dispositive "less burdensome alternative" requirement in its punishment analysis as its grounds for finding Chapter 190 to be a bill of attainder.[2] This places the Second Circuit in conflict with the other circuits as to the proper legal test to be applied in Bill of Attainder Clause cases. This is the heart of the conflict among the Circuits.

This conflict is compounded by a fundamental uncertainty in each of the Circuits about whether or not corporations are to be afforded bill of attainder protections, and the unexamined "assumption" by several circuits that they are. *See SBC Communications, Inc. v. FCC*, 154 F.3d 226, 234 (5th Cir. 1998); *Bellsouth I*, 144 F.3d at 63; *Bellsouth II*, 162 F.3d at 684; *Club Misty v. Laski*, 208 F.3d 615, 617 (7th Cir. 2000).

This conflict and confusion should be remedied by this Court.

The conflict appears clearly in the respective opinions of the D.C., Fifth, and Second Circuits.

The D.C. Circuit's language is explicit:

> In addition, as we noted in *BellSouth I*, Congress may read the evidence before it in a different way than might this court or any other, so long as it remains clear that Congress was pursuing a legitimate nonpunitive purpose. In other words, *it does not matter that Congress arguably could have enacted different legislation* in an effort to open the long distance markets to competition.

Emphasis added. Bellsouth II, 162 F.3d at 689. *Citing BellSouth I*, 144 F.3d 58. *Internal citations omitted.* The D.C. Circuit clearly rejects the "less burdensome alternative" test that the Second Circuit relies upon in this case.

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[2] The Second Circuit asserts "we look beyond simply a rational relationship of the statute to a legitimate public purpose for 'less burdensome alternatives.'" *Con Ed*, 292 F.3d at 350 *citing Nixon, 433 U.S. at 482.*

The Fifth Circuit similarly did not apply a "less burdensome" analysis in its Bill of Attainder Clause analysis. The Fifth Circuit stated "In the light of the 400 years of case law and history that we have considered, we believe that *Nixon* stands, ultimately and concisely, for the following proposition: if legislation has a legitimately nonpunitive function, purpose, and structure, it does not constitute punishment for purposes of the Bill of Attainder Clause, even where it imposes the historically punitive sanction of barring designated individuals from engaging in certain professions." *SBC Communications,* 154 F.3d at 241. The Fifth Circuit's failure to apply such a "less burdensome alternative" test is different from the approach of the Second Circuit.

A. The Second Circuit Conceded that Chapter 190 Does Not Run Afoul of the Three Requirements of the Bill of Attainder "Punishment" Prong.

First, the Second Circuit admitted that Chapter 190 has many legitimate non-punitive purposes, including the one most central to the Legislature's investigation and findings. "The legislature could legitimately conclude that, as between Con Ed, the party that caused the outage, and the ratepayers, parties having nothing whatsoever to do with the outage, Con Ed should bear the costs attributable to its negligence. The legislature could decide that it would be unfair to force ratepayers to absorb the costs of Con Ed's error. If such a conclusion were reached by a court in a negligence action, for instance, no one would reasonably conclude that the court had "punished" Con Ed."[3] *Con Ed,* 292 F.3d at 352.

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[3] Despite finding a legitimate non-punitive purpose, the Second Circuit reasoned that "by lumping all costs of the outage together and forcing Con Ed to absorb them, the legislature piled on a burden that was obviously disproportionate to the harm caused." *Con Ed,* 292 F.3d at 353. The Second Circuit concluded that

Second, the Second Circuit conceded that Chapter 190 does not meet the historical meaning of punishment, such as a fine, confiscation of property, or denial of the right to work. It recognized that this Court has held that an adverse utility-rate decision is not "confiscatory." However, without any other historical analysis, it concluded that "[a] statute need not fit within the historical category of punishment to be considered such." *Con Ed*, 292 F.3d at 351.

And third, the Second Circuit conceded the absence of evidence of the traditional indicia of punitive legislative intent. "The evidence of punitive intent in the legislative record in this case *is insufficient on its own* to justify a conclusion that Chapter 190 is punitive. But the stated intent of at least some legislators ... to punish Con Ed reinforces our *independent conclusion* that a substantial part of the legislation cannot be justified by any legislative purpose but punishment." *Emphases added. Con Ed*, 292 F.3d at 354–55. The Second Circuit does not offer any other evidence of punitive legislative intent for its "independent conclusion."

B. The Second Circuit Creates An Additional Dispositive Inquiry in the Bill of Attainder Analysis.

Having thus far failed to invalidate Chapter 190 by applying the traditional test, the Second Circuit looked for

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because Chapter 190 did not allow all of these undetermined costs to Con Edison, and that some of these costs would have been incurred even in the absence of Con Edison's misconduct it found no "*wholly non-punitive purpose* to justify the entire cost-allocation prohibition." *Emphasis added. Con Ed*, 292 F.3d at 351-54. It cited no authority for such a restrictive test, which in fact directly conflicts with this Court's holding in *Selective Srvc. Sys.*, which characterized the relevant test as "whether the challenged state can be *reasonably* said to further nonpunitive goals." *Emphasis added.* 468 U.S. at 853-54.

new grounds to invalidate that statute. It decided to "look *beyond simply a rational relationship* of the statute to a legitimate public purpose for 'less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives.'" *Citations in original. Con Ed*, 292 F.3d at 350, *citing Nixon*, 433 U.S. at 482. The Second Circuit mistakenly created this additional line of inquiry and made it dispositive of the question of punishment. The Second Circuit ignored the warnings of this Court about the language in *Nixon*. In *Nixon*, this Court stated that

> One final consideration should be mentioned in light of the unique posture of this controversy. In determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature (here Congress) could have achieved its legitimate nonpunitive objectives.

Nixon, 433 U.S. at 482. Thus, *Nixon* limited the "less burdensome alternative" inquiry to the unique circumstances of the *Nixon* case. Most importantly, it did so as part of the overall determination, not as the Second Circuit held, as an additional and dispositive element of the existing three prong 'punishment' inquiry under *Selective Srvc. Sys.*, 468 U.S. at 852, and not as the sole basis for overturning a statute as a bill of attainder.

The overreaching by the Second Circuit becomes clearer upon a complete reading of the *Nixon* decision. In *Nixon*, mindful of the "social and political realities of 1974" and the "political turbulence unprecedented in our history," this Court stated that it

> is not free to invalidate Acts of Congress based upon inferences that we may be asked to draw from our personalized reading of the contemporary scene or recent history. In judging the constitutionality of the Act, we may only look to its terms, to the intent expressed by Members of Congress who voted its

> passage, and to the existence or nonexistence of legitimate explanations for its apparent effect.

Nixon, 433 U.S. at 484. This Court has made clear that the "less burdensome" inquiry relied on by the Second Circuit should not be used as subterfuge to strike down legislation because it does not comport with a court's social or economic policy preferences.

The Second Circuit created a new, dispositive test for finding punitive intent without any record evidence of such intent; it admitted that restraining Con Edison from charging ratepayers for the consequences of its own misdeeds is a legitimate purpose; and it was unable to find any historical precedent for defining a rate allocation system as punishment. It then chose to substitute it own policy preferences for the measured decision of the Legislature and the Governor. This is unconstitutional, unwise and will serve to endanger economic regulatory decisions made by legislative bodies across the nation.

The sheer unworkability of the Second Circuit's "*less* burdensome" test is a function of the difficulty, if not the impossibility, of determining which of several potential legislative remedies is less burdensome. This test would have been difficult enough if the Second Circuit sought the "*least*" burdensome alternative but it will always be possible to argue to a Court that some other or new remedy is "less" burdensome than that selected by the legislature. Courts are particularly unprepared to make these relative policy judgments.

The Second Circuit's "less burdensome alternative" analysis, if upheld, will place the federal courts in the untenable and unconstitutional position of substituting their judgments about the relative merits of competing economic regulatory options, decisions which are functionally and constitutionally best made by elected legislative bodies. In the instant case, the fact that a "less burdensome alternative" existed, in the opinion of the Second Circuit, is the only evidence cited of the Legislature's intent to punish.

The Second Circuit's belief that the Legislature might have taken a different route with Chapter 190 is not reason for it to be struck down as a bill of attainder when it otherwise fails to meet the requirements of *Nixon* and *Selective Srvc. Sys.*, and does not violate other constitutional provisions. In contrast to the correct legal test applied by the Fifth, Seventh, and D.C. Circuits, the Second Circuit's reliance on this additional element, if upheld, will open a floodgate of litigation challenging otherwise valid state economic regulation, and will probably result in the re-litigation of the issues in the cases decided by the other Circuits, and may provoke the Federal Civil Rights statutes to challenge state economic regulatory statutes.

This Court should use its supervisory power to clarify this conflict and reaffirm that the *Nixon* case was in its own words, "unique" and that the traditional three-pronged test, unaltered, remains the correct standard.

This conflict among the Circuits as to the correct test to be applied is compounded by the assumption by three Circuits that corporations enjoy the protections of the bill of attainder provision of the Constitution, as opposed to the specific holding by the Second Circuit to the same effect. Since the federal intrusion into state regulatory authority over corporations is substantial, and the consequences of this new uncertainty are significant, this Court should decide for itself whether a new constitutional right will be conferred, as discussed below in III.

II. THE SECOND CIRCUIT ERRED IN USING THE BILL OF ATTAINDER CLAUSE TO LIMIT STATE REGULATORY AUTHORITY OVER UTILITIES BY CREATING A PROPERTY RIGHT IN A PORTION OF AN OVERALL UTILITY RATE IN CONTRAVENTION OF DECISIONS OF THIS COURT, AND STRIKING DOWN A STATE REGULATORY STATUTE OTHERWISE CONSTITUTIONAL, THEREBY PLACING IN QUESTION THE RATEMAKING AUTHORITY OF STATE LEGISLATURES.

A. The Regulation of Utilities is a State Legislative Function.

The regulation of corporate economic behavior, especially of regulated monopolies, is a traditional and important function of state government. This Court has firmly and repeatedly held that utility ratemaking is a legislative function, which can be exercised directly by the legislature or delegated to a subsidiary body. The existence of the subsidiary body does not diminish the authority of the legislature to act directly. By inserting a bill of attainder analysis the Second Circuit has created a new, unworkable, federal judicial intrusion into the operations of state legislatures and their ability to protect their citizens from economic wrongdoing by regulated monopolies.

The Second Circuit plainly ignored this Court's holding in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). "[I]t cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates." *Duquesne*, 488 U.S. at 313. This Court affirmed that ratemaking remained a legislative function, even as states across the nation chose to set aside the historical practice of individual utility rates for individual utilities being set by individual statutes, and began to establish regulatory commissions. *See Knoxville v. Knoxville Water Co.*, 212 U.S. 1 (1909). In *Knoxville*, this Court carefully eschewed an opportunity for judicial intervention into the ratemaking process, noting that "[t]he function of ratemaking is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body." *Knoxville*, 212 U.S. at 8.

New York Courts have similarly ruled on numerous occasions that utility regulation remains essentially

legislative in nature. *See People ex rel. Municipal Gas Co. v. Public Serv. Comm'n*, 224 N.Y. 156, 166-67 (1998) ("The Legislation . . . intended to retain unto itself the power of fixing rates . . . We cannot discern in such retention of legislative power any violation of constitution provision."); *Matter of Brooklyn Union Gas v. Maltbie*, 245 A.D. 74, 75 (1935) ("Ratemaking is a legislative function; the commission acts by delegated authority. Legislative methods may be followed in arriving at a decision and rate.")[4] The Second Circuit decision intrudes bill of attainder protections upon this legislative power in ways that will cause uncertainty and disruption of the regulatory process unless clarified by this Court.

B. Utilities Have No Property Interest In A Portion of Their Overall Rate.

The Second Circuit compounded its initial attack on the legislative ratemaking function by declaring, again in contravention of *Duquesne* and other decisions of this Court, that a utility has a property right in a portion of an overall utility rate which is otherwise just and reasonable. The Second Circuit ruled that Con Edison was deprived of a property interest by Chapter 190, which undisputedly deals with only one portion of Con Edison's overall rate structure, the Fuel Adjustment Clause. "Chapter 190 clearly deprived Con Edison of a property interest." *Con Ed*, 292 F.3d at 351. Con Ed has never asserted, indeed concedes, that their overall rate is adequate and fair. In *Duquesne*, this Court ruled that a utility does not have a property right in a

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[4] An additional consequence of the Second Circuit decision may be that ratemaking, whether done by legislatures or by their designees will be constrained to use judicial processes required by the Second Circuit in this case in spite of well settled doctrine that legislative methods may be used to set rates.

component of its overall rate, stating that "[i]f the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end." *Duquesne*, 488 U.S. at 310. The creation of a property right in a portion of a rate will disrupt the traditional, well-settled, and effective state regulatory structures and policy, and invite burdensome litigation when either legislatures or their designees change a portion of an overall rate structure.

C. Bill of Attainder Protections Are Not A Substitute For Other Constitutional Protections.

This Court has specifically ruled that bill of attainder protections are not to be a substitute for other constitutional protections used to attack legislative exercise of the police power. As Justice Brennan warned, "[h]owever expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine." *Nixon*, 433 U.S. at 471. Con Edison initially attacked the statute as constitutionally invalid on four separate grounds, equal protection, due process, violation of contract and bill of attainder. All these matters were extensively briefed and argued in both the District and Circuit courts. The District Court held for Con Ed on equal protection and bill of attainder grounds. The Second Circuit discounted the equal protection holding and relied solely on bill of attainder to invalidate the statute. *Con Ed*, 292 F.3d at 345 n. 2.

Chapter 190 was carefully drawn to preserve all constitutional protections, and yet protect citizens against the economic consequences of wrongdoing and negligence by a monopoly corporation. Having met the appropriate constitutional thresholds for such economic regulation, the Legislature should not be hamstrung by a new, additional, and unworkable restriction on its regulatory authority. This is especially true when the judicial intervention takes the form of a new constitutional right, such as the bill of

attainder protections afforded to corporations. Only the most thorough and dispositive declaration by this Court should be the basis of the profound and wrenching reconfiguration of the state-federal relationship on the regulation of corporations created by state law, especially regulated monopolies that have both public and private attributes.

III. THE UNWARRANTED EXTENSION OF BILL OF ATTAINDER PROTECTIONS TO CORPORATIONS GENERALLY, AND REGULATED MONOPOLIES SPECIFICALLY, IS A SIGNIFICANT ERROR AND A QUESTION OF SIGNIFICANT PUBLIC IMPORTANCE.

The protections of the Bill of Attainder Clause have previously been applied by this Court only to natural persons or groups of natural persons who were oppressed or disfavored by the government for their political or personal activities. The essential purposes of the English and American restrictions on bills of attainder have been to protect those without the power or resources to protect themselves from the overwhelming power of legislative oppression, as other sections of the Constitution protect against executive oppression. The extension of bill of attainder protections to private corporations is without precedent, inconsistent with the purposes and history of bills of attainder, and a dramatic federal intrusion into state economic regulation. The Second Circuit apparently was aware of the significance of its decision when it acknowledged that it was "unable to unearth *any* case in which a corporation has ultimately prevailed in challenging legislation as a bill of attainder." *Emphasis added.* Con Ed, 292 F.3d at 348. This is especially true when applied to regulated monopolies, against whom state regulatory and ratemaking powers are the sole and acknowledged protection for people subject to the monopoly.

The decision of the Second Circuit will have a significant impact on the legal, economic and practical structures of everyday life because it may expose numerous laws regulating economic activity to constitutional challenge – even in highly regulated industries such as utilities where legislatures have traditionally exercised broad powers.

Corporations may rely on the Second Circuit's decision to attempt to overturn legitimate corporate regulation of individual or groups of corporations. And, because the specificity requirement of the Bill of Attainder Clause is met where the legislation singles out "an identifiable group," corporations could use the language and logic of the Second Circuit to bring bill of attainder challenges to many commonplace economic measures that limit the conduct of or place regulatory burdens upon particular industries. The consequences of such uncertainty will be felt by every court and every legislative body in this country.

Corporations do have protections against unjust regulatory initiatives in the Takings Clause, the Equal Protection Clause and the Due Process Clause. The Bill of Attainder Clause protections will be a burdensome and unnecessary restriction of legislative activity.

The Second Circuit extension of Bill of Attainder Clause protections to corporations is based on a misreading of the test used by this Court when extending constitutional rights to corporations and a misreading of this Court's previous decisions. The Second Circuit acknowledged that this Court has not "directly" ruled on the question, citing *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). In *Katzenbach* this Court rejected a claim by South Carolina that the Voting Rights Act was a bill of attainder against the states of the Union. *Katzenbach*, 383 U.S. 301. This Court held that the Clause did not apply to states because "courts have consistently regarded the Bill of Attainder Clause . . . only as protection for individual persons and private groups, those who are peculiarly vulnerable to non-judicial determination

of guilt." *Katzenbach, 383 U.S. at 324.* There is no reason to think this reference encompasses corporations.

The other decision of this Court relied upon by the Second Circuit, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), has an even more tenuous connection to the issue here, for it did not involve a bill of attainder claim. Rather, *Plaut* was a challenge to a provision of the Securities and Exchange Act of 1934 on the ground that it required federal courts to reopen final judgments in violation of principles of separation of powers and due process. The Second Circuit cited dictum in *Plaut*, 514 U.S. at 239 n. 9 for the assertion that "a bill of attainder may target a 'single individual *or firm*'" without discussion of the definition of the word.[5] *Emphasis in original. Con Ed*, 292 F.3d at 347.

The Second Circuit, based upon these two cited cases from this Court, concluded with circular logic that "[a] corporation shares some of the characteristics of a 'private group,' but we need not decide whether corporations are included within the category of private groups because the reference to private groups plainly contemplates protection for some entities in addition to individual natural persons." *Con Ed*, 292 F.3d at 347.

In fact, this Court has applied Bill of Attainder Clause protections only five times in its history, and only to natural persons and groups of natural persons who are particularly weak or powerless because of their vulnerability or unpopularity. In *United States v. Brown*, 381 U.S. 437 (1965), the act struck down made it a crime for present and former

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[5] Dictionary definitions of "firm" make it clear, however, that a corporation, with its independent legal existence, is not a firm. A firm is "a partnership of two or more persons that is not recognized as a legal person distinct from the members composing it." Merriam-Webster's Dictionary of Law, visited on August 18, 2002 (http://dictionary.lp.findlaw.com). A "business entity or enterprise. Unincorporated business. Partnership of two or more persons." Blacks Law Dictionary, 6th Ed. (1990) at 634.

members of the Communist Party to serve as officers of a labor union. In *United States v. Lovett*, 328 U.S. 303 (1946) the act provided that no federal budget appropriation could be used for salaries of three specifically named government employees who had been named as subversives by the House Committee on Un-American Activities unless reappointed by the President and confirmed by the Senate. In *Ex parte Garland*, 71 U.S. 333 (1866), the act conditioned admission to the practice of law upon an oath that the individual never bore arms against or supported enemies of the United States. In *Cummings v. Missouri*, 71 U.S. 277 (1866), the act made it a crime to practice law or be a clergyman without taking an oath that the individual had not been disloyal to the United States. Finally, in *Pierce et al. v. Carskadon*. 83 U.S. 234 (16 Wall.) (1872), a case very similar to *Ex parte Garland* and *Cummings*, this Court protected individuals denied the right to seek judicial redress because they were ex-Confederates. In these successful bill of attainder cases, the challenged statutory sanctions were against natural persons, Communists or Confederates, people perceived as subversives or traitors, and widely considered politically disloyal to the United States government.

The Second Circuit's decision wrongly takes a considerable leap from these precedents when it finds a corporation analogous to one or more unpopular natural persons.

A. This Court Has Limited Its Application of Bill of Attainder Protections to the "Peculiarly Vulnerable."

"Courts have consistently regarded the Bill of Attainder Clause of Article I, . . . only as protections for individual persons and private groups, those who are 'peculiarly vulnerable to non-judicial determinations of guilt." *Katzenbach*, 383 U.S. at 324, *citing Brown*, 381 U.S. 437 and *Ex*

parte Garland, 4 Wall 332. *See also Landgraf v. USI Products et al.*, 511 U.S. 244, 253 (1994) ("The prohibitions on Bills of Attainder in Art. I §§ 9-10, prohibit legislatures from singling out disfavored persons.").

The Second Circuit ignored this Court's application of Bill of Attainder protections only to "disfavored" or "peculiarly vulnerable" natural persons because, in the case of a multi-billion dollar monopoly, it cannot make such a finding, any more than Con Edison itself has ever made such a claim. The notion that it can be used as a defense for state regulation of corporate or monopoly wrongdoing stands the constitution on its head and leaves individual and groups of natural persons at the mercy of a state created legal fiction, a monopoly utility. The limitation of bill of attainder protections to one or more natural persons is consistent with the history, purposes, and application by this Court of the Bill of Attainder Clause.

B. The Nature, History and Purpose of the Bill of Attainder Clause Are "Purely Personal," and Therefore, Should Not Be Applied To Corporations.

This Court has carefully considered the "nature, history, and purpose" of constitutional protections sought by corporations, and granted some and denied others. In this case, the Second Circuit concluded "the protection afforded by the Bill of Attainder Clauses is not a "'purely personal' guarantee" and therefore is one of the constitutional rights enjoyed by corporations." *Con Ed*, 292 F.3d at 347. "[C]ertain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantees has been limited to the protection of individuals." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79 n. 14 (1978) (*citing United States v. White*, 322 U.S. 694, 698-701 (1944)). The test of "whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends

on the nature, history, and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at 778-79.

This Court undertook an extensive review of the history of the Bill of Attainder Clause in *Nixon*. This Court stated that "[i]n England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death" and also proscribed "enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than executions." *Nixon*, 433 U.S. at 473 – 474 (*citing United States v. Lovett* at 323-324 (Frankfurter, J., concurring); *Cummings v. Missouri*, 71 U.S. at 323 and Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, at 97 (1956). As an example, this Court cited a specific bill of attainder legislatively sentencing James, Duke of Monmouth to death. *Nixon*, 433 U.S. at 474 (*citing* 1 Jac. 2, c.2 (1685). This Court cited Blackstone for provisions that usually accompanied such a bill, such as "forfeiture of the condemned person's property to the King and the corruption of his blood, whereby his heirs were denied the right to his estate," practices dating back to the Norman conquest of England. *Nixon*, 433 U.S. at 474 (*citing* 4 W. Blackstone Commentaries 388.) This Court's historical analysis also discussed its expansion of the bill of attainder protection to include legislative enactments "barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those specifically branded as disloyal." *Nixon*, 433 U.S. at 474. *Citations omitted.*

The only historical reference to the history and purposes of the Bill of Attainder Clause made by the Second Circuit is its unexamined reference to ancient English law. "Con Ed cites several English statutes that imposed disabilities on English boroughs, hardly natural persons. *See, e.g.*, 1 & 2

Geo. 4, c.47 (Eng. 1821)."[6] *Con Ed*, 292 F.3d at 348. The Second Circuit offers no other evidence or analysis of the history of Bill of Attainder protections.[7] This Court has spoken clearly about the limited value of such early English precedents in *Wilson*, "[w]e have not overlooked the early English decisions to which our attention has been called . . . but these cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws." *Wilson v. United States*, 221 U.S. 361 at 385–86. The Second Circuit's historical analysis, resting purely on these English precedents as it does, is incompatible with the instructions of this Court.

With respect to the nature and purpose of the Bill of Attainder Clause, the Second Circuit failed to consider factors that motivated the Founders to include bill of attainder protections in the Constitution, and their considerable resentment towards the nature and purpose of English Bills of Attainder. The Founders saw a compelling need to proscribe the legislative power misused against individuals. James Madison, in Federalist 44, noted that such Bills are "contrary to the first principles of the social compact" and that Americans "have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." *The Federalist Papers*. Clinton Rossiter, ed. Mentor Books, New York (1961) at 282. Alexander Hamilton quoting Blackstone in Federalist 84, stated that

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[6] It should be noted that in English law a borough is a governmental entity, not a private corporation.

[7] The Second Circuit, instead stated that the Clause's history has been "aptly described elsewhere . . . we see no need to reiterate it here." *Con Ed*, 292 F.3d at 346.

"To bereave a man of life "O says he" or by violence to confiscate his *estate*, without accusation or trial, would be so gross and notorious an act of despotism." *Id.* at 511-2. There is never the slightest hint that the Legislative effort in Chapter 190 to protect the citizenry from the economic misdeeds of its own legal creations could rise to the level of a bill of attainder.

A comparison of decisions granting and denying constitutional protections to corporations further illuminates why bill of attainder protections should not be granted to corporations.

In *Marshall v. Barlow's, Inc.*, this Court found that the constitutional provision against unreasonable search and seizure applied to corporations. 436 U.S. 307 (1978). This Court held that "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." *Marshall*, 436 U.S. at 312. In reaching this conclusion, this Court in looking to the American colonial experience stated that "[t]he general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and business men whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." *Marshall*, 436 U.S. at 310. This Court also cited the Virginia Bill of Rights, which predates the U.S. Bill of Rights, which specifically "opposed 'general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed.'" *Id. (citing in footnote* H. Commager, Documents of American History 104 (8th ed. 1968). Thus, this Court's review of the historical basis of the Fourth Amendment's Warrant Clause protections showed both the history and purpose of the protection, and that it was intended to apply to and protect the merchants and other businessman of the day. There is no similar history with respect to bill of attainder protections.

In *White*, this Court held that the right against self-incrimination set forth in the Fourth and Fifth Amendments of the Constitution did not apply to corporations because their purpose was "directed primarily to the protection of individual and personal rights." *White*, 322 U.S. at 698. This Court reasoned that the

> constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the necessary evidence to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.

White, 322 U.S. at 698.

The application of the Bill of Attainder Clause to corporations thus has no grounding in history, law or precedent, and is completely inconsistent with the traditional and necessary power of states to protect their citizens from corporate wrongdoing. As noted above, there is no claim here that Chapter 190 fundamentally interferes with Con Edison's ability to conduct its business, nor that Chapter 190 created an overall rate of return that is unfair or unjust. There was a question about who should pay the costs associated with the undisputed negligence of Con Edison with respect to Indian Point. The Legislature, faced with a specific set of actions by Con Edison and their economic consequences apportioned the economic harm as between innocent ratepayers and a culpable monopoly. There is no basis in history or logic to use bill of attainder protections to limit state authority over a monopoly utility.

If, arguendo, bill of attainder protections were to be afforded to private corporations, their further application to regulated monopolies would not be sound doctrine because of the acknowledged, quasi-public nature of such utilities. Con Edison is not a corporation as that term is commonly understood and used, but instead is a unique creation of New York State Law. Con Edison is a quasi-governmental public utility publicly vested with public responsibilities such as the right of condemnation. *See* N.Y. Transportation Corp. Law § 11 (McKinney 2000). Thus, the line between government and private corporation is significantly blurred in this case. As this Court noted in *Katzenbach*, a State may not maintain a bill of attainder claim. *Katzenbach*, 383 U.S. at 324. As such, the protections of the bill of attainder cannot attach to Con Edison.

The limited use of this constitutional provision by this Court to acts of unfairness against the politically unpopular, rather than as a shield against appropriate economic regulation of corporations was best summed up by Justice Brennan who, when speaking for this Court in *Nixon* noted

> any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. *United States v. Lovett*. [citation omitted in original.] However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," *United States v. Brown*, 381 U.S. at 443, it does not do so by limiting Congress to the choice of

legislating for the universe, or legislating only benefits, or not legislating at all.

433 U.S. 425, 471-72.

CONCLUSION

As this Court noted in *Nixon*, "[f]orbidden legislative punishment is not involved merely because the Act imposes burdensome consequences." 433 U.S. at 472. While Con Edison may argue that Chapter 190 is burdensome, it does not impose punishment within the meaning of the Bill of Attainder precedents of this Court.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: September 3, 2002.

APPENDIX A

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Plaintiff-Appellee, v. GEORGE E. PATAKI, in his official capacity as Governor of the State of New York, MAUREEN O. HELMER, in her official capacity as Chairman of the New York State Public Service Commission, THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD D. WEISS and NEAL N. GALVIN in their official capacities as Commissioners of the New York State Public Service Commission, Defendants-Appellants, RICHARD L. BRODSKY, New York State Assembly Member and SHELDON SILVER, New York State Assembly Speaker, Intervenors-Defendants-Appellants.

Docket Nos. 00-9358(L), 00-9426(CON), 00-9442(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

292 F.3d 338; 2002 U.S. App. LEXIS 10762

May 21, 2001, Argued
June 5, 2002, Decided

PRIOR HISTORY: [**1] Defendant state officials appeal from a judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, District Judge) permanently enjoining enforcement of a state statute against plaintiff Consolidated Edison Company of New York, Inc. on the grounds that the statute violated the Equal Protection Clause of the Fourteenth Amendment and the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution.

Consolidated Edison Co. of N.Y., Inc. v. Pataki, 117 F. Supp. 2d 257, 2000 U.S. Dist. LEXIS 14985 (N.D.N.Y. 2000)

DISPOSITION: Affirmed and remanded for correction of judgment.

COUNSEL: LAURA ETLINGER, Assistant Solicitor General of the State of New York (Eliot Spitzer, Attorney General of the State of New York, Daniel Smirlock, Deputy Solicitor General of the State of New York, Peter H. Schiff, Senior Counsel, on the brief), Albany, NY, for Defendant-Appellant Governor Pataki.

LAWRENCE G. MALONE, Public Service Commission of the State of New York (Diane T. Dean, on the brief), Albany, NY, for Defendants-Appellants Commissioners of the Public Service Commission.

RICHARD L. BRODSKY, ESQ., New York State Assembly, Counsel to the Majority (Rosemary Perez Jaquith, on the brief), Albany, NY, for Intervenors-Defendants-Appellants.

GUY MILLER STRUVE, [**2] Davis, Polk & Wardwell (James D. Liss, Florence A. Crisp, Zachary D. Stern, Davis, Polk & Wardwell, Charles E. McTiernan, Jr., Richard J. Giglio, Scott A. Levinson, Roxana Barsalona, Consolidated Edison Company of New York, Inc., on the brief), New York, NY, for Plaintiff-Appellee.

JOHN C. RICE, ESQ., Rice & Justice (Lawrence P. Justice, Bradley F. Rice, on the brief), Albany, NY, for Amicus Curiae Business Council of New York State, Inc.

MICHAEL F. MCBRIDE, LeBoeuf, Lamb, Greene & MacRae, LLP (Bruce W. Neely, Martin G. Malsch, John W. Lawrence, LeBoeuf, Lamb, Greene & MacRae, LLP, Edward H. Comer and Henri Bartholmot, Edison Electric Institute, Robert W. Bishop and Ellen C. Ginsberg Nuclear Energy Institute, on

the brief) Washington, DC, for Amici Curiae Edison Electric Institute and Nuclear Energy Institute.

JUDGES: Before: WALKER, Chief Judge, JACOBS, Circuit Judge, LARIMER, Chief District Judge.*

OPINION BY:
JOHN M. WALKER, JR.

OPINION:

[*342]

JOHN M. WALKER, JR., Chief Judge:

Defendant state officials appeal from a judgment of the [**3] United States District Court for the Northern District of New York (Lawrence E. Kahn, District Judge) permanently enjoining enforcement of a New York state statute against plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed") on the grounds that the statute violated the Equal Protection Clause of the Fourteenth Amendment and [*343] the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution. We affirm solely on the basis of Art. I, § 10, but remand to the district court to correct a scrivener's error in the judgment.

BACKGROUND

Plaintiff Con Ed is a public utility that provides electrical power to New York City. Among Con Ed's power plants is the Indian Point 2 Nuclear Generating Facility ("IP2")

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* The Honorable David G. Larimer of the United States District Court for the Western District of New York, sitting by designation.

located in Westchester County, New York. The statute at the heart of this appeal was enacted in response to a power outage at IP2 caused by a defective generator.

Until recently, IP2 produced electricity with four "Model 44" steam generators that Con Ed had purchased from the Westinghouse Corporation ("Westinghouse") in 1972. In the late 1970s, Westinghouse learned that the steam generator tubes on both its Model 44 and 51 steam generators were subject [**4] to corrosion and failure. By 1997, seven of the eight nuclear power plants using the Model 44 had replaced their generators. Although other power plants apparently continued to use the similarly flawed Model 51 steam generators, only IP2 continued to use the flawed Model 44 generators. Con Ed purchased replacement generators for IP2 in 1985, but, prior to the incident at issue in this litigation, had never installed them.

On February 15, 2000, a steam tube in one of IP2's Model 44s developed a crack which released radioactive steam into the surrounding nonradioactive water that is converted to steam to turn IP2's power-generating turbines. A subsequent investigation by the federal Nuclear Regulatory Commission ("NRC") and the New York State Public Service Commission ("PSC" or "the Commission") revealed no evidence of elevated radiation levels offsite due to the incident. The cracked tube was promptly discovered and Con Ed took IP2 offline to replace the generator. By January 2001, it had finished replacing the damaged generator with one purchased in 1985 and restarted IP2. To cover electricity demand while IP2 was offline, Con Ed was forced to purchase electricity from other sources. [**5]

Con Ed operates IP2 in a complex regulatory environment. The public health and safety aspects of its operations are regulated by the NRC under the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq. (1994). The rates that Con Ed charges its customers are regulated by the PSC, an independent state regulatory body created early in the twentieth century.

A 1997 settlement agreement resolved a number of outstanding disputes between Con Ed and the PSC that have no bearing on this appeal. The agreement amended Con Ed's rate and was adopted in the form of a rate order by consent. Of relevance to this appeal, the agreement includes a so-called "fuel adjustment clause" ("FAC"), which allows Con Ed to pass certain costs along to its ratepayers in the form of temporary rate increases. Con Ed's authority to pass costs through to ratepayers under the FAC is subject to statutory review by the PSC to determine whether those costs are prudently or "reasonably" incurred, in order to ensure just and reasonable rates. N.Y. Pub. Serv. Law §66(12)(k) (2001); see Long Island Lighting Co. v. Pub. Serv. Comm'n, 134 A.D.2d 135, 523 N.Y.S.2d 615, 620 (N.Y. App. Div. 1987). [**6] The PSC is empowered to bar Con Ed from passing imprudently incurred costs along to ratepayers and to force the utility to refund imprudently incurred costs already recouped. N.Y. Pub. Serv. Law § 66(12)(k) (2001). [*344]

Pursuant to the FAC, Con Ed increased its rates to incorporate the cost of purchasing replacement electricity and the other costs associated with the outage. Soon after the incident, the PSC staff began a prudence investigation of the IP2 outage, and on March 30, 2000, the PSC itself initiated a prudence review. It is our understanding that this review is still incomplete as of the issuance of this opinion.

On February 18, 2000, three days after the outage, the New York State Assembly issued a notice of a joint public hearing of the Assembly Committees of Energy, Environmental Conservation, and Corporations, Authorities, and Commissions, to be held on a variety of topics related to the outage and Con Ed's operation of IP2. The notice listed potential topics including: the environmental effects of the incident, deterioration of facilities at IP2, the need for greater regulatory oversight of nuclear power in New York, and the potential sale of the IP2

plant. The hearing [**7] was held on March 3, 2000, and it covered the range of topics listed in the notice. Con Ed's Chief Operating Officer, J. Michael Evans, and its Vice President of Maintenance and Construction, Stephen Quinn, testified. They later supplemented their testimony in a six-page letter to several members of the committee.

On March 20, 2000, intervenors-defendants Representatives Brodsky and Silver introduced the bill that is the subject of the present lawsuit. See A. 10096, 2000 Assembly (N.Y. 2000). One week later, on March 27, the Assembly and Senate passed the bill without amendment. Governor Pataki signed it into law on August 8 as Chapter 190 of the Laws of 2000 ("Chapter 190"). See Act of Aug. 8, 2000, ch. 190, 2000 N.Y. Laws, (hereinafter, 2000 N.Y. Laws 190). Chapter 190 reads, in full, as follows:

> § 1. Declaration of legislative findings. The operator of a nuclear generating facility has a high duty of care to protect the health, safety and economic interests of its customers. Rate regulation of nuclear operators should discourage the taking of risks with regard to potential threats to public health and safety.
>
> By continuing to operate steam generators known to [**8] be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers. Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.
>
> § 2. With respect to the February 15, 2000 outage at the Indian Point 2 Nuclear Facility, the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its

ratepayers any costs associated with replacing the power from such facility. Such prohibition shall apply to any such costs incurred until the conclusion of such outage, or incurred at any time until all defective steam generation equipment at the facility has been replaced, whichever occurs later. Such prohibition shall apply to automatic adjustment mechanisms as well as base rates or any other rate recovery mechanism. The commission shall order the company to refund any such costs which have been recovered from ratepayers.

§ 3. This act shall [**9] take effect immediately.

The PSC has estimated that Con Ed would have been able to pass on to its customers approximately $ 250 million in increased [*345] costs that Chapter 190 requires it to internalize.

On August 14, 2000, Con Ed filed suit in the District Court for the Northern District of New York, seeking a declaratory judgment and permanent injunction barring enforcement of the statute on various constitutional grounds and on August 17 moved for a preliminary injunction. Con Ed alleged that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Bill of Attainder Clause of Article I, Section 10, the Due Process Clause of the Fourteenth Amendment (alleging a violation of procedural due process and an uncompensated taking), the Supremacy Clause, and the Contracts Clause of Article I, Section 10. On September 6, 2000, the district court granted a motion by Representative Brodsky, a member of the Assembly, and Representative Silver, the speaker of the Assembly, to intervene in the suit.

In a memorandum order dated October 10, 2000, the district court granted Con Ed's request for a permanent injunction and denied as moot Con Ed's motion for a preliminary [**10] injunction. Con Ed v. Pataki, 117 F. Supp.

2d 257 (N.D.N.Y. 2000). The district court agreed with Con Ed that the statute violated the Equal Protection Clause, finding that Chapter 190 was not rationally related to the state's legitimate interest in deterring negligence at nuclear power plants. Id. at 262-65. The district court also held that Chapter 190 constituted an impermissible Bill of Attainder because the statute named Con Ed and was the product of a legislative intent to punish Con Ed. Id. at 265-71. The court expressly refused to reach Con Ed's other constitutional claims. After judgment was entered on December 4, 2000,[1] the defendants appealed.

DISCUSSION

Because we conclude that Chapter 190 is an unconstitutional bill of [**11] attainder, we affirm the district court. We need not and do not address Con Ed's other constitutional theories.[2]

I. The Bill of Attainder Clause of Article I, Section 10

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[1] The judgment incorrectly, and incomprehensibly, stated that "the case is DISMISSED in its ENTIRETY, in favor of the Plaintiff." We accordingly remand for correction of this obvious scrivener's error. See infra, Part II.

[2] We thus do not decide whether Chapter 190 violates the Equal Protection Clause, which supplied one basis for the district court's injunction. We are skeptical, however, that the Clause would require invalidation of Chapter 190: "[M]ere underinclusiveness is not fatal to the validity of a law under . . . equal protection[,] even if the law disadvantages an individual or identifiable members of a group." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 471 n.33, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977) (internal citations omitted). To be so invalidated, the classification must have "no rational basis," Village of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000), and we doubt that the present statute meets that standard.

The Constitution includes two clauses prohibiting [**12] enactment of "bills of attainder": Section 9 applies to Congress, Section 10 to the states. See U.S. Const. art. I, §§ 9, 10. The history of bills of attainder and of pains and penalties in England,[3] which gave rise to the constitutional [*346] prohibitions in § 9 and § 10, has been aptly described elsewhere, and we see no need to reiterate it here. See In re Extradition of McMullen, 989 F.2d 603, 604-06 (2d Cir. 1993) (in banc). Briefly stated, a constitutionallyproscribed bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977); see also United States v. Lovett, 328 U.S. 303, 315, 90 L. Ed. 1252, 66 S. Ct. 1073, 106 Ct. Cl. 856 (1946) ("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."). Put another way, the Clause bars the imposition [**13] of punishment resulting from "trial by legislature." United States v. Brown, 381 U.S. 437, 442, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965).

Under the definition quoted above from Nixon, a statute can be a bill of attainder only if (1) it "determines guilt and inflicts punishment," (2) "upon an identifiable individual," and (3) "without provision of the protections of a judicial

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[3] In English practice, bills of attainder imposed the death penalty. Other, less severe punishments were imposed by "bills of pains and penalties." The Supreme Court has held that the constitutional prohibition reaches both. See United States v. Brown, 381 U.S. 437, 447, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138, 3 L. Ed. 162 (1810) (Marshall, C.J.) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.").

trial." Nixon, 433 U.S. at 468. In the present case, the lack of [**14] a judicial trial is incontrovertible. Chapter 190 was enacted by the state legislature using purely legislative processes, without any additional protections akin to those present in a judicial trial. At issue, then, are only the questions of whether (1) Con Ed, singled out as it was by Chapter 190, is an "individual" that may invoke the protection of the Clause, (2) Chapter 190 "determines guilt," and (3) Chapter 190 "inflicts punishment." We answer all three questions in the affirmative.[4]

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[4] Our analysis is unaffected by separation of powers principles, on which the district court relied heavily, 117 F. Supp. 2d at 268, citing Brown, 381 U.S. at 441, 443-45. Brown was decided under the Clause applicable to Congress in Article I, § 9, not that in § 10, which applies to the states. Brown's statements about separation of powers doctrine are inapplicable to the § 10 Bill of Attainder Clause for the simple reason that the federal Constitution does not impose any particular separation of powers requirement on state governments: "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612, 81 L. Ed. 835, 57 S. Ct. 549 (1937); see also Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 615 n.13, 39 L. Ed. 2d 630, 94 S. Ct. 1323 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers.") (citing Sweezy v. New Hampshire, 354 U.S. 234, 256, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (Frankfurter, J., concurring)); Dreyer v. Illinois, 187 U.S. 71, 84, 47 L. Ed. 79, 23 S. Ct. 28 (1902) ("Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate . . . is for the determination of the state."). Indeed, where § 10 is involved, our concern for the independent operation of each of the branches of government must be tempered by our concern about preserving to the states the choice of government structures. See 1 Laurence H. Tribe, American Constitutional Law § 2-4, at 132-33 (3d ed. 2000).

[**15]

A. The Clause's Applicability to Corporations

Chapter 190 unquestionably singles out Con Ed: the utility is expressly named in the statute. The legislator defendants argue, however, that the Bill of Attainder Clause applies only to legislation that targets natural persons, not corporations such as Con Ed. We disagree.

Although a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law," Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636, 4 L. Ed. 629 (1819), a [*347] wide variety of constitutional rights may be asserted by corporations. See, e.g., Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985) (equal protection); Marshall v. Barlow's, Inc., 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978) (reasonable search and seizure); United States v. Martin Linen Supply Co., 430 U.S. 564, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977) (double jeopardy); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976) (freedom of speech). Nevertheless, [**16] not all constitutional protections apply to corporations or apply as fully as they do to natural persons. See, e.g., United States v. Morton Salt Co., 338 U.S. 632, 651-52, 94 L. Ed. 401, 70 S. Ct. 357, 46 F.T.C. 1436 (1950) (privacy); Wilson v. United States, 221 U.S. 361, 382-86, 55 L. Ed. 771, 31 S. Ct. 538 (1911) (Fifth Amendment privilege against self-incrimination). The distinction between rights that may be asserted by corporations and those that may not is that "[c]ertain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778-79 n.14, 55 L. Ed. 2d 707,

98 S. Ct. 1407 (1978). Whether a right is purely personal "depends on [its] nature, history, and purpose." Id.

The applicability of the Bill of Attainder Clause to corporations remains unsettled in every circuit. Without directly ruling on the question, the Supreme Court has stated, without discussion, that the Clause provides "protections for individual persons and private groups [**17], those who are peculiarly vulnerable to nonjudicial determinations of guilt," South Carolina v. Katzenbach, 383 U.S. 301, 324, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966) (emphasis added). A corporation shares some of the characteristics of a "private group," but we need not decide whether corporations are included within the category of private groups because the reference to private groups plainly contemplates protection for some entities in addition to individual natural persons. The Court has also indicated in dictum that a bill of attainder may target a "single individual or firm." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995) (emphasis added). No Court of Appeals has held as much, though several have expressly assumed without deciding that the Clause is applicable to corporations, finding the Clause inapplicable in the particular cases for other reasons. See Club Misty, Inc. v. Laski, 208 F.3d 615, 617 (7th Cir. 2000); Navegar, Inc. v. United States, 338 U.S. App. D.C. 213, 192 F.3d 1050, 1065 (D.C. Cir. 1999); SBC Communications, Inc. v. FCC, 154 F.3d 226, 234 & n.11 (5th Cir. 1998). [**18] For several reasons, we think the protection afforded by the Bill of Attainder Clauses is not a "'purely personal' guarantee[]" and therefore is one of the constitutional rights enjoyed by corporations.

First, the "historical function" of the Clause has been to ensure the procedural protections of the judicial process for the attribution of guilt and imposition of punishment. See Nixon, 433 U.S. at 468-69; Brown, 381 U.S. at 442, 445; Lovett, 328 U.S. at 316-17; Cummings v. Missouri, 71 U.S. (4

Wall.) 277, 323, 18 L. Ed. 356 (1866). That guarantee is closely related to the right to procedural due process. See Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468-69 (7th Cir. 1988) (discussing the relationship between procedural due process rights and the prohibition on bills of attainder); see also Screws v. United States, 325 U.S. 91, 106, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945) (stating that "it is plain that basic to the concept of [*348] due process of law in a criminal case is a trial — a trial in a court of law".) The right to procedural due process has been applied to corporations. [**19] See, e.g., Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 413-19, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984).[5]

Second, the cases in which the Court has refused to apply constitutional rights to corporations have uniformly involved competing state interests in regulating corporate conduct and investigating corporate wrongdoing, which depend on a high degree of transparency. Wilson v. United States, in which the Court held the Fifth Amendment privilege against self-incrimination inapplicable to corporations, rested its holding primarily on the "visitatorial power" that remains vested in the state after it grants a corporation its charter. See 221 U.S. at 382-84. Likewise, in United States v. Morton [**20] Salt Co., the Court justified its decision that corporations enjoy narrower rights to privacy by the state's interest in investigating corporate wrongdoing: "law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U.S. at 652. Unlike visitatorial powers which do not directly affect the bottom line, punishment necessarily affects shareholder

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[5] Although less closely analogous, the Sixth Amendment right to trial by jury in criminal cases has also been applied to corporations in this Circuit. See United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 663 (2d Cir. 1989).

assets. Although New York unquestionably has an interest in investigating, regulating, and prosecuting the malfeasance of corporations within its borders, it has no interest in inflicting punishment for such malfeasance on the corporation's shareholders through the legislative process. Indeed, in the instant circumstances, a "law-enforcing agency," the PSC, has an existing administrative procedure to vindicate the interest in exploring utilities' wrongdoing: the prudence review process. That process addresses the state's interest in investigating and punishing utilities' misfeasance, and to the extent it does not do so adequately, the legislature may enact generally applicable legislation modifying that process.

Because punishment can frequently [**21] take the form of economic injury, a comparison with the Takings Clause of the Fifth Amendment is apt. The protection against targeted economic injury in the Takings Clause is fully applicable to corporations. See, e.g., United States v. 91.90 Acres of Land, 586 F.2d 79, 85-86 (8th Cir. 1978). For both the Takings Clause and the Bill of Attainder Clauses, if the protections did not extend to corporations, their protections would be significantly undermined for individuals. When a corporation suffers an economic injury, its shareholders suffer the same economic injury. In order to protect shareholders from the economic injuries prohibited by the Takings Clause and the Bill of Attainder Clauses, corporations must be allowed to raise the clauses directly.

We have been unable to unearth any case in which a corporation has ultimately prevailed in challenging legislation as a bill of attainder — cases finding a bill of attainder targeting any party are extraordinarily rare. Nevertheless, bills of attainder historically have targeted corporations as well as natural persons. Con Ed cites several English statutes that imposed disabilities on English boroughs, hardly natural [**22] persons. See, e.g., 1 & 2 Geo. 4, c.47 (Eng. 1821). Moreover, one of the types of

punishment most frequently imposed by bills of pains and penalties, punitive confiscation of private property, see Selective [*349] Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852, 82 L. Ed. 2d 632, 104 S. Ct. 3348 (1984), is one that may injure a corporation in the same way it injures an individual. Cf. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 284-85, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (O'Connor, J., concurring in part and dissenting in part) (arguing that Eighth Amendment Excessive Fines Clause applies to corporations, in part because a corporation, as an entity, may be subject to such penalties).

We therefore hold that corporations must be considered "individuals," Nixon, 433 U.S. at 468, that may not be singled out for punishment under the Bill of Attainder Clause in Article I, Section 10.

B. Retrospective Focus: Guilt

Another indispe sable element of a bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment [**23] on that past conduct. See Nixon, 433 U.S. at 472-73; Cummings, 71 U.S. (4 Wall.) at 325. Such a bill attributes guilt to the party or parties singled out in the legislation. See Nixon, 433 U.S. at 468; De Veau v. Braisted, 363 U.S. 144, 160, 4 L. Ed. 2d 1109, 80 S. Ct. 1146 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt."); Cummings, 71 U.S. (4 Wall.) at 323 (in enacting a bill of attainder "the legislative body . . . assumes . . . judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial").

Although on its face Chapter 190 does not speak in terms of guilt or innocence, we have no doubt that the legislature considered Con Ed guilty of wrongdoing in allowing the IP2 outage to occur. The primary evidence of

this is the statute's focus on Con Ed's conduct related to a single, past incident, the IP2 outage, as the basis for the sanction it imposes. Chapter 190 makes explicit findings about the outage and concludes that "the Consolidated Edison Company failed to exercise [**24] reasonable care on behalf of the health, safety and economic interests of its customers." 2000 N.Y. Laws 190 § 1. The legislature's response is also limited to the IP2 incident, prohibiting Con Ed from "recovering from its ratepayers any costs associated with replacing the power from such facility." 2000 N.Y. Laws 190 § 2. The statute thus imposes liability "determined by no previous law or fixed rule." Lovett, 328 U.S. at 317 (internal quotation marks omitted). Although an established procedure existed for determining whether Con Ed had been "imprudent" in incurring the costs associated with the outage, the legislature bypassed it and, in a single stroke, found guilt on the facts of Con Ed's case. The legislature, as the source of the PSC's authority, retains the power to reclaim authority over rate-setting from the PSC. However, the decision to bypass the PSC reinforces our conclusion that the legislature's decision was to find guilt and order punishment directly.

The retrospective focus of Chapter 190 is essential to our determination that the statute is a bill of attainder. The power of legislatures to enact purely prospective changes to utility rates, even [**25] to the rates of a single utility, is considerably broader than their authority to act retrospectively.

C. Punishment

To invalidate legislation as a bill of attainder, the Bill of Attainder Clause "requires not merely 'singling out' but also punishment." Plaut, 514 U.S. at 239 n.9; accord Nixon, 433 U.S. at 471-72 & n. 33 [*350] (holding that "the Act's specificity — the fact that it refers to appellant by name —

does not automatically offend the Bill of Attainder Clause"). A legislature may legitimately create a "class of one " for many purposes, see, e.g., Nixon, 433 U.S. at 472-73, but not for punishment. We therefore must ascertain whether Chapter 190 punishes Con Ed.

Punishment of wrongdoing is, of course, a legitimate state interest reflected in the penal laws of the fifty states. Where a statute establishing a punishment declares and imposes that punishment on an identifiable party, however, the Bill of Attainder Clauses undermine the usual solicitude we have for such purposes. In such cases, we look beyond simply a rational relationship of the statute to a legitimate public purpose for "less burdensome alternatives [**26] by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives." Nixon, 433 U.S. at 482.

Legislated punishment is not always easy to identify outside the traditional punishments of death or incarceration. Neither "the fact that harm is inflicted by governmental authority," Lovett, 328 U.S. at 324 (Frankfurter, J., concurring), nor "the severity of [the] sanction is . . . determinative of its character as 'punishment,'" Flemming v. Nestor, 363 U.S. 603, 616 n.9, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960). Indeed, as traditionally conceived, punishment implicates a variety of values that, in other contexts, bear no necessary relation to punishment. For example, a judicial order of compensation in a negligence action imposes "harm" on the defendant — he must pay the damage award — but that harm is merely compensatory for the plaintiff's injury, not punitive. Compensation may be part of a punishment, on the other hand, as where a criminal defendant is ordered to make restitution to his victim. Similarly, deterrence may be a legitimate, nonpunitive goal, such as deterrence of unreasonable conduct produced [**27] by a damages award for negligence — but it is also a core component of punishment. See, e.g., Brown, 381 U.S. at 458. Retribution

may be one value that is limited to the arena of punishment, but it is not a necessary part of "punishment." See Selective Serv. Sys., 468 U.S. at 851-52; Brown, 381 U.S. at 458 ("It would be archaic to limit the definition of 'punishment' to 'retribution.'").

The Supreme Court articulated three factors to guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a [legislative] intent to punish.'" Selective Serv. Sys., 468 U.S. at 852 (quoting Nixon, 433 U.S. at 473, 475-76, 478). Nixon makes it clear that a statute need not fit all three factors to be considered a bill of attainder; rather, those factors [**28] are the evidence that is weighed together in resolving a bill of attainder claim. Nixon, 433 U.S. at 473-78. The party challenging the statute has the burden of "establish[ing] that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." Id. at 476 n.40. Unfortunately, because the Supreme Court's bill of attainder jurisprudence is limited, it provides us with little guidance for determining whether a statute is impermissibly punitive. [*351]

1. Traditional Punishments

We look first to the "infamous history of bills of attainder" to determine whether Chapter 190 imposes the sorts of "deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [the Clause]." Id. at 473. Some types of legislatively imposed harm, in other words, are considered

to be punitive per se. The classic example is death, but others include "imprisonment, banishment, . . . the punitive confiscation of property[, and prohibition of] designated individuals or groups from participation in specified [**29] employments or vocations." Id. at 473-74; accord Selective Serv. Sys., 468 U.S. at 852.

The only traditional punishment implicated here is punitive confiscation of property. On the one hand, Chapter 190 clearly deprived Con Ed of a property interest by prohibiting the ordinarily permitted pass-through of costs. All told, Chapter 190 deprives Con Ed of approximately $250 million that it would otherwise have been able to obtain from its customers. On the other, we are not certain that a "deprivation" is the same thing as a "confiscation," and indeed, the Supreme Court has held that an adverse utility-rate decision is not "confiscatory" for the purposes of the Takings Clause unless it produces an overall unfair rate of return for the utility. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 310, 313-14, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989).

A statute need not fit within the historical category of punishment to be considered such. Such a rule would render the Clauses unable to respond to attempts by contemporary legislatures to punish individuals in new and heretofore unforeseen ways. See Nixon, 433 U.S. at 475. [**30] We need not resolve this close question to conclude that Chapter 190 is nonetheless a bill of attainder. Accordingly, we do not decide whether Chapter 190 imposes a traditional attainder and turn instead to the next component of the test.

2. The "Functional" Test: Nonpunitive Statutory Goals

The second component of the Supreme Court's test is "functional," looking to

> whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. . . . Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Id.; see also Flemming, 363 U.S. at 615 (describing "inability to discern any alternative [nonpunitive] purpose which the statute could be thought to serve" as a basis for finding a statute to be punitive) (citing Trop v. Dulles, 356 U.S. 86, 97, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion)); Brown, 381 U.S. at 476 (White, J., dissenting) ("The imposition of a particularly harsh [**31] deprivation without any discernible legitimate legislative purpose has ... been characterized as penal."). In doing so, we "inquire into the existence of less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives." Nixon, 433 U.S. at 482. Try as we may, we can discern no wholly non-punitive purpose to justify the entire cost-pass-through prohibition in Chapter 190.

To be sure, part of the statute's cost-pass-through prohibition has an arguably [*352] non-punitive purpose. By preventing Con Ed from passing through the costs associated with the IP2 outage that it would not have incurred ordinarily, the legislature prevented Con Ed's ratepayers from being forced to bear costs that the legislature viewed as negligently incurred. Con Ed would be forced to compensate its ratepayers for costs passed through prior to Chapter 190's enactment and could not force ratepayers to bear any further pass-throughs due to the IP2 outage. This is not necessarily a punitive purpose. The legislature could legitimately conclude that, as between Con Ed, the party that caused the outage, and the ratepayers, parties having nothing whatsoever [**32] to do with the

outage, Con Ed should bear the costs attributable to its negligence. The legislature could decide that it would be unfair to force ratepayers to absorb the costs of Con Ed's error. If such a conclusion were reached by a court in a negligence action, for instance, no one would reasonably conclude that the court had "punished" Con Ed.[6] This is a distributional fairness rationale that has nothing inherently to do with punishment.

Nevertheless, eliminating harm to innocent third parties is a purpose consistent with punishment. See Brown, 381 U.S. at 458 (noting that "[a] number of English bills of attainder were enacted for preventive purposes"). However, because there is a clear non-punitive component to cost-allocation, we think that, if that were all that Chapter 190 did, [**33] it would be insufficient to justify a conclusion that the statute punishes Con Ed.

Chapter 190 also functions to deter similar conduct by Con Ed and other public utilities in the future. By forcing Con Ed to absorb the costs of the outage, the statute encourages Con Ed and other utilities to be more diligent thereafter in avoiding similar outages. In this respect, Chapter 190 serves an economic-regulatory function. As a regulated monopoly, Con Ed does not face the same incentives to minimize costs as does an actor in a competitive market. Indeed, that fact is the basic justification of regulation of such monopolies: the state may act to encourage the monopoly to minimize costs as if it were faced with competition. See Paul A. Samuelson & William D. Nordhaus, Economics 520-21 (12th ed. 1985). Chapter 190 can be viewed, in part, as accomplishing that regulatory function, enhancing economic efficiency rather than

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[6] Indeed, in tort, a punitive damages award would be inappropriate for a finding of mere negligence. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 2, at 9-10 (5th ed. 1984).

punishing Con Ed for wrongdoing. State regulation of utilities to promote economic efficiency is a longstanding and unquestionably legitimate goal of state legislation. See New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 365, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) [**34] ("'[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.'") (quoting Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983)) (alteration in original).

Chapter 190 might also deter negligent conduct with an eye toward protecting public health; the legislative findings in Chapter 190 focus to a considerable extent on the "potential threats to public health and safety" from nuclear power plant accidents. 2000 N.Y. Laws 190 § 1. All other things being equal, this would be an ample justification for the deterrent function of Chapter 190. However, the field of public health and safety regulation [*353] of nuclear power generation has been occupied by Congress through the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq., and therefore any regulation in that area by the states is preempted. See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206-07, 212, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); Suffolk County v. Long Island Lighting Co., 728 F.2d 52, 59-60 (2d Cir. 1984). [**35] Consequently, we cannot consider public health and safety as a valid, non-punitive justification for Chapter 190.

General and specific deterrence are also traditional justifications for punishment, however. See Selective Serv. Sys., 468 U.S. at 851-52 ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."); 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law, § 1.5(a)(1), (4) (1986). If the entirety of the cost-pass-through prohibition served the economic-regulatory function described above, we might be willing to conclude that Chapter 190's

deterrent function was non-punitive. Our view of the "type and severity of burdens imposed," Nixon, 433 U.S. at 475, by Chapter 190, however, leads us to a different conclusion.

Our reading of the record and statements made by counsel at oral argument indicate that some indefinite but quite substantial proportion of the costs that Con Ed has sought to pass through to its ratepayers that are denied by Chapter 190 could have been passed through unchallenged if Con Ed had installed the new generators in the ordinary [**36] course of business at any time after they received them in 1985. To install new generators, Con Ed must take IP2 offline for an extended period of time. During this period, Con Ed must purchase power on the open market to cover the lost generating capacity at IP2. Further, Con Ed would have to pay the cost of labor and parts necessary to remove the old generators and install the new ones. These costs would be incurred whenever the generators are replaced, whether during scheduled maintenance prior to the generators' failure or, as here, after that failure had occurred. Such costs are ordinary to the business and thus may be ordinarily passed through.

Of course, there would be some differences in the costs incurred during a scheduled outage and those incurred during an accidental outage. The failure might cause damage to other facility components, which would need tobe repaired or replaced. There may be some differences in the cost of labor between a scheduled and unscheduled replacement: for instance, Con Ed might be required to pay more overtime to workers in the event of an unplanned outage. The cost of power would also likely differ between the time at which a scheduled outage [**37] could have occurred and the time at which the accidental outage occurred. Indeed, if Con Ed had replaced the generators during a planned outage, it presumably would have intentionally timed the outage to coincide with a period of reduced energy prices. The bulk of the labor and power-

replacement costs under either scenario, however, appear to be the same.[7]

It is undisputed that Con Ed would have been allowed to pass through to ratepayers the costs of covering power demand while replacing the generators during a scheduled outage. What, then, we must ask, other than punishment can justify forcing Con Ed to absorb those same costs after the accidental outage? Neither of the legitimate [*354] purposes set out above — prevention of harm to ratepayers and deterrence of inefficient, monopolistic conduct — can justify preventing Con Ed from passing these costs along [**38] to ratepayers. It does not protect ratepayers from, or compensate them for, new unjustified costs, because those costs would have been incurred even if Con Ed had acted as a prudent, model corporate citizen. Nor does it deter Con Ed or other utilities from incurring excess costs in the future: if Con Ed were faced with precisely the same situation in the future, it might be discouraged from delaying the installation of replacement generators, but in acting more quickly it would incur substantially the same costs that it now is being precluded from passing through to its ratepayers. There is no connection between these costs and the sort of lax monopolistic conduct that utility regulation would ordinarily seek to deter.

Moreover, there are plainly "less burdensome alternatives by which [the] legislature ... could have achieved its legitimate nonpunitive objectives." Nixon, 433 U.S. at 482. The legislature easily could have tailored Chapter 190 to exclude from the pass-through prohibition those substantial costs that would have been incurred absent misconduct on Con Ed's part. For instance, it could have limited the pass-through prohibition to the incremental

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[7] Although the district court found this to be the case, it did not make findings about the exact amount of these costs. 117 F. Supp. 2d at 270.

cost [**39] of energy beyond that prevailing when the replacement generators were purchased and any costs associated with the unplanned nature of the accidental outage such as overtime pay and damage to other facility components. Although we do not mean to hold that these costs need to have been identified with surgical precision, the legislature in this case made no attempt whatsoever to ensure that the costs imposed on Con Ed were proportional to the problems that the legislature could legitimately seek to ameliorate. Rather, by lumping all costs of the outage together and forcing Con Ed to absorb them, the legislature piled on a burden that was obviously disproportionate to the harm caused.

Whether a government action is punishment varies depending on context. There may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation. Similarly, the government may have more flexibility to take actions that affect public utilities than it does when dealing with corporations in competitive markets. We need not explore this issue further to resolve this case, however, because Chapter 190 demonstrates a punitive intent even though it applies [**40] to a public utility corporation.

3. Indicia of Punitive Legislative Intent

Finally, we look to see whether the legislative history evinces a legislative intent to punish. See Selective Serv. Sys., 468 U.S. at 852 (citing Nixon, 433 U.S. at 478); Brown, 381 U.S. at 476 (White, J., dissenting). The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish. See Flemming, 363 U.S. at 617 ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]"); see also, e.g., Lovett, 328 U.S. at 308-12

(recounting extensive evidence of punitive intent in the legislative record). Statements by a smattering of legislators "do not constitute [the required] unmistakable evidence of punitive intent." Selective Serv. Sys., 468 U.S. at 856 n.15 (internal quotations omitted). Although the evidence of [*355] punitive intent in the legislative record in this case is insufficient on its own to [**41] justify a conclusion that Chapter 190 is punitive, the legislative history does contain some explicit evidence of punitive intent. That legislative history bolsters our prior conclusion that a significant portion of Chapter 190's cost-pass-through prohibition is plainly punitive.

Our reading of the legislative history indicates that certain legislators unquestionably intended to punish Con Ed: there are clear references by two senators to punishment and penalties. A sponsor of the legislation, Senator Velella, stated: "Con Edison has done a terrible thing here. . . . And Velella's law is going to stop them and punish them." A. 10096, N.Y. Senate Debate Transcript, at 3906-07 (2000) (statement of Sen. Velella); see also A. 10096, N.Y. Senate Debate Transcript, at 3912 (2000) (statement of Sen. Oppenheimer) (arguing that Con Ed "should certainly be penalized").

The statements of a few legislators are plainly not overwhelming evidence of penal intent, and if that were the only evidence that the statute is punitive, we would have no trouble holding that the statute is not a bill of attainder. But the stated intent of at least some legislators — most notably one of the floor managers [**42] of the legislation — to punish Con Ed reinforces our independent conclusion that a substantial part of the legislation cannot be justified by any legislative purpose but punishment.

D. Severability

Chapter 190 is not susceptible to severance of constitutional provisions from unconstitutional provisions because it contains only a single unitary provision. We are disinclined to rewrite the legislation to fashion a rule that the legislature never intended by attempting to identify and sever those costs Con Ed may constitutionally be prevented from passing through from the rest. In addition, because the punitive intent of some portions of Chapter 190 is clear, we conclude that all of Chapter 190 is a bill of attainder, absent clear evidence that some severable section was passed without punitive intent. Because no such evidence exists and the statute is a unitary provision that resists severability analysis, we invalidate Chapter 190 in its entirety.

In finding Chapter 190 to be a bill of attainder, we are mindful of the infrequency with which this constitutional provision has been used to strike down legislation. That rarity is attributable to the extraordinary scarcity [**43] of legislation of the type presented in Chapter 190. When faced with a bill that is so exceptionally narrow in scope, manifestly retrospective in focus, and unavoidably punitive in operation, we cannot allow it to stand, notwithstanding the heavy presumption of legitimacy that is ordinarily accorded legislative decisions. In such circumstances we are reminded of Alexander Hamilton's reflection on the function of judicial review in Federalist 78:

> [A] limited constitution [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Federalist No. 78, at 466 (Hamilton) (Clinton Rossiter, ed., 1961) (italics removed).

II. Scrivener's Error in the Judgment

Although we affirm, we must remand to the district court with direction [**44] to correct [*356] the obvious scrivener's error on its judgment form, indicating that "the case is DISMISSED in its ENTIRETY, in favor of the Plaintiff and against the Defendants; and it is FURTHER ORDERED, that the plaintiff's motion for a permanent injunction is GRANTED." Cf. United States v. Latorre-Benavides, 241 F.3d 262, 264 (2d Cir.) (per curiam) (affirming but remanding to correct typographical error in judgment), cert. denied, 532 U.S. 1045 (2001).

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby affirmed. The case is remanded to the district court to conform the judgment to the substance of the district court's disposition. The district court shall strike the words "the case is DISMISSED in its ENTIRETY, in favor of the Plaintiff . . ." and replace them with "JUDGMENT is GRANTED, in favor of the Plaintiff . . ." Costs are awarded to the Plaintiff-Appellee.

APPENDIX B

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Plaintiff, vs. GEORGE E. PATAKI, in his official capacity as Governor of the State of New York; MAUREEN O. HELMER, in her official capacity as Chairman of the New York Public Service Commission; and THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD WEISS and NEAL N. GALVIN in their official capacities as commissioners of the New York Public Service Commission, Defendants. SHELDON SILVER, Speaker of the New York State Assembly, and RICHARD L. BRODSKY, Member of the New York State Assembly, Intervenor-Defendants.

00-CV-1230 (LEK)(RWS)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

117 F. Supp. 2d 257; 2000 U.S. Dist. LEXIS 14985

October 10, 2000, Decided
October 10, 2000, Filed

DISPOSITION: [**1] Plaintiff's motion for permanent injunction GRANTED; Plaintiff's motion for preliminary injunction DENIED as moot.

COUNSEL: For CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., plaintiff: Charles E. McTiernan, Jr., phv, Richard J. Giglio, Stephen Brewi, Scott Levinson, Consolidated Edison Company of New York, Inc., New York, NY.

For GEORGE E. PATAKI, defendant: Edward M. Scher, AAG, Office of Attorney General, State of New York, Jeffrey

P. Mans, State of New York, Office of the Attorney General, Litigation Bureau, Albany, NY.

For MAUREEN O. HELMER, THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD A. WEISS, NEAL N. GALVIN, defendants: Kevin M. Lang, New York State Public Service Commission, Department of Public Service, Albany, NY.

For RICHARD L. BRODSKY, SHELDON SILVER, intervenors-defendants: William F. Collins, New York State Assembly, Office of Counsel to the Majority, Albany, NY.

JUDGES: Hon. Lawrence E. Kahn, United States District Judge.

OPINION BY: Lawrence E. Kahn

OPINION: [*260]

MEMORANDUM - DECISION AND ORDER

Presently before the Court is Plaintiff's motion for a preliminary and permanent [*261] injunction enjoining enforcement of Chapter 190 of the Laws of 2000.[1] For the

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[1] In relevant part, the law states:

> By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care ... Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.... [T]he New York State public service commission

reasons set forth below, Plaintiff's motion for a permanent injunction is GRANTED and its motion for a preliminary injunction is DENIED as moot.

[**2]

I. Background

A. Indian Point Nuclear Power Plant

In 1972, Plaintiff purchased Model 44 steam generators from Westinghouse and installed them in its Indian Point 2 Nuclear Plant. In the mid to late 1970's, Westinghouse discovered that the metal alloy used to make the steam generator tubes in Model 44 and Model 51 steam generators was susceptible to corrosion. Approximately 30 nuclear plants in the United States were using these two types of generators at the time of this discovery. By January 1, 1997, 13 plants had replaced the defective generators, 16 had not, and one plant had ceased operation. Plaintiff did not replace its generators because of its mistaken belief that they could safely remain in operation for many more years.

On February 15, 2000, one of the tubes located in the Model 44 generators in the Indian Point Plant suffered a 2-inch tear that allowed radioactive fluid to leak through a tube wall and mix with water and steam in one of the steam generators. The Indian Point Plant was shut down pending review of the incident by the Nuclear Regulatory Commission. In the interim, Plaintiff has decided to replace the existing model 44 generators with replacement [**3] generators purchased in 1988. Until these replacement

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shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility ... [S]uch prohibition shall apply to the automatic adjustment mechanisms as well as base rates or any other recovery mechanism.

generators are in place, Plaintiff will have to purchase power from other utilities to replace the power lost due to the Indian Point Plant's inability to operate. These replacement costs will cost Plaintiff between $165 million and $200 million.

B. New York Regulatory Framework

New York law allows the New York Public Service Commission ("PSC") to set energy rates that Plaintiff charges to its retail customers. These rates are set pursuant to the terms of a five-year Settlement Agreement approved by the PSC in 1997. Under the Agreement's terms, variations in costs Plaintiff incurs each month as it generates or purchases power can be passed onto its customers. The mechanism allowing this to occur is known as a Fuel Adjustment Clause ("FAC") (now called a Monthly Adjustment Charge).

PSC practice codified by state statute enables the PSC to retroactively adjust monthly utility rates charged to Plaintiff's customers (following a hearing) if the PSC determines that a utility like Plaintiff collected unreasonable charges under the FAC. When Plaintiff began reflecting the costs of Indian Point replacement power purchases [**4] in the FAC, the PSC commenced a proceeding to review the reasonableness of those charges. Had this proceeding determined that Plaintiff acted negligently in failing to replace the generators at Indian Point, the PSC would have ordered it to refund to its customers all costs associated with purchasing Indian Point replacement power.

C. The Indian Point Law

The New York State Assembly drafted Chapter 190 of the Laws of 2000 ("Indian Point Law" or "Chapter 190" or the "Bill") [*262] following the PSC's determination not to

immediately suspend operation of Plaintiff's use of the FAC. The Law, approved by both the Assembly and the New York State Senate and signed by Governor Pataki, nullified the already commenced PSC review process by directly ordering it to prohibit Plaintiff from recovering from its ratepayers any costs associated with replacing power from the February 15, 2000 outage at the Indian Point Plant. The basis for this law is the legislative finding that "[b]y continuing to operate steam generators known to be defective ... the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers."

Plaintiff [**5] has asked this Court for a preliminary and permanent injunction enjoining enforcement of the Indian Point Law. Furthermore, Plaintiff has asked this Court to declare the Indian Point Law violative of (1) the Equal Protection Clause of the 14th Amendment; (2) the Procedural Due Process requirements of the 14th Amendment; (3) the Supremacy Clause; (4) the Contracts Clause contained in Article 1, § 10; and (5) the Prohibition on Bill of Attainder also contained in Article 1, § 10.

II. Equal Protection

A. Standard

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 15. The clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)). Legislation that does not restrict a fundamental right or employ a suspect

classification, like the social and economic legislation at issue [**6] in this case, is presumed valid as long as it is rationally related to a legitimate government interest. See Cleburne Living Center, 473 U.S. at 440; Romer v. Evans, 517 U.S. 620, 631, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996).

This presumption of validity is buttressed by the notion that governments are entitled to wide deference when enacting social and economic legislation government. See Cleburne Living Center, 473 U.S. at 439. It is not the job of a federal court to ascertain the wisdom of a challenged statute or the utility of a questioned law. See id.; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). This does not mean that this Court is stripped of its power to substantively review the legitimacy of social and economic legislation. See, e.g., Dep't of Agriculture v. Moreno, 413 U.S. 528, 532, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973) (striking down a state statute which limited receipt of food stamps to households of related individuals while excluding households containing unrelated individuals as not rationally related to the stated purposes [**7] of the Food Stamp Act); see generally Zobel v. Williams, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982).

Rather, this Court must ascertain whether any set of facts exist that may reasonably justify the challenged law. See McGowan v. Maryland, 366 U.S. 420, 425-426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). If this Court determines that a reasonable justification for the law exists, it is required to uphold it. See, e.g., Vacco v. Quill, 521 U.S. 793, 807, 138 L. Ed. 2d 834, 117 S. Ct. 2293 (1997) (finding a reasonable justification to warrant classifying terminally ill patients who refuse medical treatment differently from patients who wish to engage in physician assisted suicide). Conversely, if this Court determines that the legislature acted arbitrarily or classified Plaintiff upon some ground not having a fair and substantial relation to the object of the act, such that

similarly situated persons are treated differently, it [*263] must strike down the statute. See Reed v. Reed, 404 U.S. 71, 76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971); see also, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 (1920). [**8]

Defendants' lawyers contend that the legislature's determination to create a statute directed at Plaintiff is simply a response to its continued use of Westinghouse Model 44 steam generators. According to them, because Plaintiff is the only nuclear operator in New York using such generators, it is impossible for any other utility to pass similar costs to its ratepayers. Therefore, the legislature rationally determined that Plaintiff is a legitimate class of one.

Although this Court recognizes that after-the-fact rationalizations of statutory classifications by lawyers and judges may serve to uphold the validity of a challenged statute, see McDonald v. Board of Election, 394 U.S. 802, 809, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969), this rationalization makes little sense when examined in light of the express legislative findings accompanying the statute. According to these findings, "the Con-Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers." Therefore, the legislature concluded, "it would not be in the public interest for the company to recover from ratepayers any costs resulting from the" Indian Point outage.

Hence, the Indian [**9] Point Law was not passed simply as a response to Plaintiff's continued use of Model 44 generators. Instead, it was passed in response to Plaintiff's failure to exercise reasonable care on behalf of the health, safety, and economic interests of its customers. As such, this Court must determine 1) whether any legitimate state interest underlies this finding and 2) if the classification of Plaintiff is rationally related to any such legitimate state interest.

B. Legitimate State Interest

To determine the legitimacy of a state interest, this Court should begin its inquiry by examining the statute itself and its legislative history. See Johnson v. Robison, 415 U.S. 361, 376, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974). As long as the purposes of the statute can be easily ascertained from these sources, this Court should limit its inquiry to them. See id. If these purposes do not offend specific constitutional prohibitions, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984) (quoting Berman v. Parker, 348 U.S. 26, 32, 99 L. Ed. 27, 75 S. Ct. 98 (1984). [**10]

The stated purposes of the Indian Point Law are found in Section 1 of the statute and the accompanying memorandum in support of the law. According to Section 1 of the statute, it is not in the public interest for the company to recover from ratepayers any costs resulting from Plaintiff's failure to exercise reasonable care on behalf of its customers. The memorandum in support of the law declares that the purpose of the bill is to "protect ratepayers from costs related to imprudence by Con-Edison Company (Con-Edison) in relation to a recent radiation leak at the Indian Point 2 Nuclear Facility."

This Court does not dispute the legitimacy of the State's laudable desire to deter negligence at nuclear power plants, protect rate payers, and regulate utility rates. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989). What this Court does view as problematic is the completely irrational manner in which the statute classifies Plaintiff in an effort to further these purposes.

C. Rational Relation of Legislature's Classification

A classification is rationally related to a legitimate government interest [*264] as long as it does not [**11] place persons into "different classes on the basis of criteria wholly unrelated to the objective of the state." Reed, 404 U.S. at 76. As long as the classification is "reasonable, not arbitrary, and [rests] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike," this Court will uphold it. Id. (quoting F.S. Royster Guano Co., 253 U.S. at 415. However, as this Court has stated, if the classification is "so under-inclusive" that it bears no relation to the statute's purpose, the Court will strike it down. Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 423 (N.D.N.Y. 1987).

In the instant case, the Court notes that the Indian Point Law singles out Plaintiff with unparalleled specificity and forbids it from recovering any costs associated from the Indian Point 2 shut-down. While it may be true that Plaintiff should not recover costs associated from the Indian Point 2 shut down, the Court fails to see how Plaintiff's allegedly negligent action here justifies the creation of a statutory class aimed directly at it. [**12] In particular, the Court sees absolutely no difference between the allegedly negligent conduct at issue in this case and any other case of nuclear power plant negligence normally brought before the PSC.

For example, had the New York State Electric and Gas Corporation engaged in negligent operation of its Nine Mile Point 2 nuclear power plant, it would have been entitled to pass replacement costs onto its customers until the PSC made a determination that the costs were incurred because of imprudence. Further, such a determination would be reviewable pursuant to Article 78 of the CPLR in the state courts. Yet, according to Defendants, Plaintiff was denied this same exact right because its negligence involved the use of a specific model of generator. In essence, Defendants want this Court to accept the premise that because only

Plaintiff could be negligent as to these specific model generators it did not have to draft a statute that applied to other similarly situated nuclear power plant operators.

This Court rejected this argument long ago. Writing in Long Island Lighting Co., Chief Judge Munson stated:

> The fact that the terms of a statute, if drafted in such a way that [**13] it applied to all like-situated individuals, would in the legislature's estimation actually affect only one of those individuals does not justify drafting the statute in such a way that it applies only to that individual and not to the others who are similarly situated. This is akin to a small community, believing that one particular individual is prone to steal automobiles, passing an ordinance prohibiting that individual from stealing automobiles but not imposing a similar prohibition on all others in the community. Clearly, such an ordinance would offend the "element of neutrality that must always characterize the performance of the sovereign's duty to govern impartially."

Id. at 424 (citations omitted). Consequently, this Court concludes that the classification of Plaintiff based upon its use of Model 44 generator is arbitrary, does not rest upon some ground of difference fairly and substantially related to the object of the statute, and treats similarly situated nuclear power plant operators differently.

Moreover, this Court notes that there is some evidence to indicate that the articulated purpose underlying this arbitrary classification is a mere pretext [**14] for an impermissible purpose offending other constitutional provisions. In particular, this Court notes that the legislative record is replete with references that the Indian Point Law was passed to punish Plaintiff for its negligence and existing

high rates.[2] If this legislative classification was upheld on the ground that punishing Plaintiff was rationally related to the statute's purposes, [*265] it would violate the most basic tenet of the Equal Protection Clause.

As the Supreme Court has emphatically stated, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." United States Department of Agriculture v. Moreno, 413 U.S. at 534. New York State's legislature is not free to "pick and choose only a few to whom they will apply legislation and [**15] thus [] escape the political retribution that might be visited upon them if larger numbers were affected." Laurence Tribe, American Constitutional Law 998 (1978) (quoting Railway Express Agency, Inc. v. New York, 336 U.S. 106, 116, 93 L. Ed. 533, 69 S. Ct. 463 (1949)). For these reasons, the Indian Point Law violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

This Court has no doubt that if the New York State Legislature passes a law creating a higher standard of care for operators of nuclear plants in comparison to other types of energy plants that applies to all similarly situated nuclear plant operators, it would pass constitutional muster. Moreover, this Court has no doubt that if the PSC ultimately determines that Plaintiff acted negligently in failing to replace the generators at Indian Point 2 and orders Plaintiff to refund all replacement costs to its customers, that too would pass constitutional muster. Unfortunately, neither of these two avenues were taken, leaving this Court no choice but to strike down the Indian Point law as violative of the Equal Protection Clause.

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[2] The punitive purpose of Chapter 190 is discussed below in Part III. B.

III. Bill of Attainder

Plaintiff also argues [**16] that the Indian Point Law violates the Constitutional Prohibition against passing any bill of attainder. Article I, Section 10 of the Constitution provides that "[n]o State shall ... pass any bill of attainder."[3] An unlawful bill of attainder is any law "that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977).

Historically, the bill of attainder was a parliamentary device used in sixteenth, seventeenth and eighteenth century England to sentence to death one or more specified persons for attempting or threatening to attempt to overthrow the government. See United States v. Brown, 381 U.S. 437, 441, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965). [**17] However, the Supreme Court has held that:

> the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply – trial by legislature.

United States v. Brown, 381 U.S. at 442. The Brown Court went on to hold that "[t]he Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying

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[3] Article I, Section 9, applicable to Congress, states that "[n]o Bill of Attainder or ex post facto Law shall be passed." Section 10 applies the same rule to the States.

appropriate punishment upon, specific persons."[4] Brown, 381 U.S. at 445; [*266] see also McMullen v. United States, 989 F.2d 603, 607 (2d Cir. 1993).

[**18]

The Court's opinion and the Clause's important purpose are borne out in the writings of the Framers themselves. James Madison wrote:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist, No. 47, at 373-74 (Hamilton ed. 1880). The Brown court also cited the writings of Madison and Alexander Hamilton in finding that:

> the authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, in a representative republic where the legislative power is exercised by an assembly which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, barriers had to be erected to ensure that the legislature would not overstep the bounds of its

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[4] Although the Supreme Court has not explicitly held so, it has stated in dicta that the Bill of Attainder Clause applies to corporate entities as well as to individuals. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995). It is this Court's opinion that such an interpretation, although not explicitly adopted by the Supreme Court, is correct given the broad intent of the Clause and it is, accordingly, adopted.

> authority and perform the functions of the other departments. [**19]

Brown, 381 U.S. at 443-44, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (quotations omitted) (citing generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton) and 78 (Hamilton)). Madison also stated that "[b]ills of attainder ... are contrary to the first principles of the social compact and to every principle of sound legislation," The Federalist, No. 44, at 282, and, quoting Montesquieu, wrote that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislature," The Federalist, No. 47, at 303.

Additionally, the Brown Court observed that a legislative body, which is by its very nature dependent upon the people, is rendered "liable to be peculiarly susceptible to popular clamor" and is "not properly constituted" to take such actions. Brown, 381 U.S. at 445 (quoting 1 Cooley, Constitutional Limitations, pp. 536-37 (8th ed. 1927)). With this fear in mind, the Court held, the Framers banned bills of attainder in order to limit legislatures "to the task of rulemaking." Id. at 446. Hence, the Supreme [**20] Court has always recognized the Bill of Attainder Clause as an important piece of the constitutional framework ensuring the separation of powers, one of our nation's most deeply imbedded principles. See, e.g., Fletcher v. Peck, 10 U.S. 87, 138, 3 L. Ed. 162 (1810) (Chief Marshall holding that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments"); Plaut, 514 U.S. at 242 (noting that "the Constitution's 'separation-of-powers' principles reflect, in part, the Framers' concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person" and that this principle was expressed "both in specific provisions, such as the Bill of Attainder Clause, and

in the Constitution's general allocation of power") (citations omitted). It is with these principles in mind that the Court will apply the Bill of Attainder Clause to the facts of this case.

A. Standard

It is well established that, in order to determine whether a legislative enactment is an unlawful bill [**21] of attainder, the Court must determine whether the challenged law inflicts punishment on specifically designated individuals or entities without the benefit of judicial trial. See Brown, 381 U.S. at 448-49 (citing United States v. Lovett, 328 U.S. 303, 315-16, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946)). In other words, a law is a bill of attainder if it satisfies "a [*267] three-pronged conjunctive test that considers whether the act: (1) imposed punishment, (2) specified the persons, and (3) lacked the protection of judicial process." McMullen, 989 F.2d at 611 (citing Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 847, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984)).

Chapter 190 clearly satisfies the second and third prongs of this test. The specificity prong is satisfied if "the challenged act singles out a person or identifiable group either by name or by describing those affected by the act 'in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.'" Long Island Lighting Co., 666 F. Supp. at 403 (quoting Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 86, 6 L. Ed. 2d 625, 81 S. Ct. 1357 (1961)). [**22] Chapter 190 takes the extraordinary step of naming Plaintiff as the solitary target of the legislation. Consequently, there is no doubt that the Indian Point Law satisfies the specificity prong of the bill of attainder test.

Likewise, it is clear that Plaintiff was not accorded judicial process in this case. Quite the contrary, Chapter 190

was passed following the ordinary legislative process. Plaintiff was given no judicial or quasi-judicial protections to fight the legislature's determination that it "failed to exercise due care" in failing to replace the generators at Indian Point 2.

B. Punishment

The harder question for the Court is whether the Indian Point Law inflicts "punishment." This is a fact-specific inquiry, McMullen, 989 F.2d at 612, and each case must turn "'on its own highly particularized context,'" Selective Service, 468 U.S. at 852 (quoting Flemming v. Nestor, 363 U.S. 603, 616, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960)). The Supreme Court has developed a series of tests to be used in determining whether the legislative enactment in question inflicts "punishment." Courts must consider: "(1) whether the [**23] challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" Selective Service, 468 U.S. at 852 (quoting Nixon, 433 U.S. at 475-76); see McMullen, 989 F.2d at 612. These tests are referred to as the "historical," "functional" and "motivational" tests, respectively. See id. Although it need not do so in order to be found violative of the Bill of Attainder Clause, Chapter 190 satisfies all three of these tests.

1. Historical Test

The "historical" test asks whether the enactment imposes a punishment "traditionally judged to be prohibited by the Bill of Attainder Clause." Nixon, 433 U.S.

at 475. Among those forms of punishment traditionally prohibited are imprisonment, banishment, execution, punitive confiscation of property and bars against participation in specified employments or vocations. See id.

In Long Island lighting Co., this [**24] Court observed that the Bill of Attainder Clause:

> has been applied only to legislation closely paralleling the historical characteristics of common law bills of attainder and bills of pains and penalties, the most important of which is a design "to inflict[] its deprivation upon the members of a political group thought to present a threat to national security."

Long Island Lighting Co., 666 F. Supp. at 403 (quoting Brown, 381 U.S. at 453). In that case, the plaintiff, in circumstances similar to those found here, claimed that acts passed by the New York State Legislature "imposed economic disabilities and deprivations" on it, constituting "punitive confiscation" of its property [*268] interests. 666 F. Supp. at 404. The Court rejected the plaintiff's arguments because the acts provided for just compensation for any property lost and, "most importantly", because the challenged acts were "not '[g]enerally addressed to persons considered disloyal to the Crown or State.'" Id. (quoting Brown, 381 U.S. at 474).

In this case, defendant PSC has estimated the total costs of the sanction imposed on Plaintiff at $ 162 million through [**25] August 31, 2000. As new steam generators will not be installed for at least a few more months, this number could eventually be much larger. Plaintiff is not offered any compensation under the terms of Chapter 190. Moreover, as discussed below, the Court finds that these sanctions were imposed for punitive purposes by the legislature. Accordingly, Chapter 190 certainly imposes "punitive confiscation of property" on Plaintiff.

Plaintiff, of course, cannot argue that it is a "political group thought to present a threat to national security."

Brown, 381 U.S. at 453. However, to suggest that, in order to fall within the traditional prohibitions of the Bill of Attainder Clause, an act must punish only members of such a class is far too cramped a reading of the standards established by the Supreme Court. Indeed, it has been noted that "[t]he concept of punishment under the bill of attainder clause has always been a fairly broad one." Laurence Tribe, American Constitutional Law § 10-4, at 642 n.9 (2d ed. 1988).

As discussed above, it is well established that the Bill of Attainder Clause is not to be construed narrowly, but rather as an important tool in assuring the separation [**26] of powers. See Brown, 381 U.S. at 442. The Framers were concerned with occasions on which the legislature could take advantage of the existing political landscape to usurp the functions of its fellow branches, not just those in which the subject of the legislation is considered a threat to the State. Considering this goal, the Clause's historical scope properly includes actions against any person or persons who are so unpopular politically that the legislature may take unilateral action against them without fear of political retribution. This is not to say that any legislation imposing limitations or restrictions on individuals or entities is suspect. Such a construction of the Bill of Attainder Clause would paralyze legislative activity. Instead, the confiscation in question must be punitive in nature, as is the case here.

Plaintiff, a powerful utility, although not the prototypical powerless victim of constitutional overreaching by any stretch of the imagination, is clearly politically unpopular. This is particularly so when it is accused of exposing the public to the risk of nuclear leaks and of unjustly passing along millions of dollars in resultant costs to the [**27] rate payers. Indeed, this was not lost on the legislature, as one Senator proclaimed during debate of the bill that it made for "great politics" but 'horrible policy." Accordingly, it fits nicely into the class of persons traditionally protected from bills of attainder.

2. Functional Test

Even if Chapter 190 does not satisfy the "historical" test, the Supreme Court has "'emphatically rejected the argument that the [Bill of Attainder Clause] outlawed only a certain class of legislatively imposed penalties.'" McMullen, 989 F.2d at 607 (quoting Brown, 381 U.S. at 447-48). In Nixon, the Court held that it had not "precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." Nixon, 433 U.S. at 475. Accordingly, the Court "often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to [*269] further nonpunitive legislative purposes." Id. at 475-76. [**28] Upon review of the stated purpose of Chapter 190, the sanctions it actually imposes, and the circumstances surrounding its enactment, the Court finds that it cannot reasonably be said to further nonpunitive goals. To the contrary, it is apparent that the purpose of Chapter 190 is to punish Plaintiff for its actions.

As discussed above, the statute's stated purpose is to "protect ratepayers from costs related to imprudence by" Plaintiff in relation to the leak at Indian Point. Although, on its face, such a purpose does not appear punitive, a number of important factors indicate that the legislature was indeed intent on punishing Plaintiff for its prior actions.

First and foremost, this Court's conclusion that the legislature's "class of one" is not rationally related to the stated purpose of the bill makes it suspect under the Bill of Attainder Clause. Although not determinative of the issue, the legislature's explicit naming of one entity to suffer the sanctions Chapter 190 inflicts, when that classification is not

rational, bespeaks an intent to punish the named entity. As Justice Kennedy stated in his Nixon concurrence, "the very specificity of the statute would mark it is [**29] punishment, for there is rarely any valid reason for such narrow legislation; and normally the Constitution requires [legislatures] to proceed by general rulemaking rather than deciding individual cases." Nixon, 433 U.S. at 485-86.

In Nixon, the Supreme Court held that "[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature ... could have achieved its legitimate nonpunitive objectives." Id. at 482. In this case, the legislature had a readily available alternative that would have achieved the same goal in a considerably less burdensome fashion. The existing regulatory framework would have prevented Plaintiff from passing costs resulting from "imprudent" actions onto its customers. Indeed, the PSC had already begun proceedings to review the prudency of the charges surrounding the leak at Indian Point.

Again, this reality was not lost on the legislature. One senator argued during debate of the bill that the legislature was making its determination without following "old fact gathering procedures [it] generally" [**30] uses and that it was performing those functions which it had "hired judges to do." Moreover, the Chairman of the PSC, defendant Maureen Helmer, wrote to the sponsors of the bill making clear that the PSC was in the process of performing a prudency review. The letter also warned the legislators of the constitutional infirmity of the proposed bill. In spite of this, the legislature took upon itself the role of adjudicator and eschewed the less burdensome alternative of a quasi-judicial determination by the PSC followed by review in the courts.

The language used by senators in debating Chapter 190 also strongly suggests a punitive intent in its passage. It is

clear from the record that the legislature made particularized findings of fact that Plaintiff engaged in blameworthy actions in the past and proceeded to institute appropriate sanctions. The sponsors and other legislators used language such as "punish" and "penalize" and "has done a terrible thing here."[5]

[**31]

[*270] Further, the Supreme Court has found that "[i]t would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent – and preventive." Brown, 381 U.S. at 458. Here, Chapter 190 itself provides that its effect will be to "discourage [nuclear operators from] risking public health and safety." That the legislature took this action against a single entity to deter future similar action is unmistakable evidence of punitive intent. As discussed this legislative intent is commendable. A general rule effecting such an intent by proscribing greater penalties for such actions, as are alleged here, would almost certainly pass constitutional muster. However, the legislature did not do this. Instead it levied punishment against a single entity and in the process subsumed the powers of all three branches of government.

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[5] For example, during Senate debates on Chapter 190 Senator Velella declared:

> Con Edison has done a terrible thing here. They have negligently performed their function as a utility company. They failed to install a generator that was given to them, to replace a defective one. And they put lives at risk. Now, nobody wants to come in and swear to the fact, yes we did that. I doubt very seriously if anybody from Con Ed ever will swear to the fact that they did it. But they did it. And Velella's law is going to stop them and punish them.

Finally, it is critical to note that counsel for defendant PSC acknowledged at oral argument that, had Plaintiff replaced the Westinghouse generators in 1988, the costs would probably have been passed onto the ratepayers with no interference from the PSC. Many of the same costs resulting [**32] from the recent leak would have been incurred if the generator had been replaced in 1988. Moreover, purchased power costs during planned refueling and maintenance outages, even when they coincide with imprudently caused outages, are recoverable by the utility. That Plaintiff is not allowed to recover these costs by Chapter 190, makes it clear that the legislature is acting to punish Plaintiff for what was deemed to be its blameworthy conduct in continuing to operate with the Westinghouse generators.

3. Motivational Test

Finally, under the "motivational" test, the Court must ascertain "whether the legislative record evinces a congressional intent to punish." Nixon, 433 U.S. at 478. As discussed above, the legislative record and all of the circumstances surrounding Chapter 190's enactment make it clear that the New York State Legislature was acting with the intent of punishing Con Edison.

In the final analysis, it is apparent to the Court that Chapter 190 constitutes exactly the kind of legislative action that the Bill of Attainder Clause was drafted to prevent. Having determined that a politically unpopular entity may have acted wrongfully, rather than setting [**33] "forth a generally applicable rule ... and leave to the courts and juries the job of deciding what [entities] have committed the specified acts or possess the specified characteristics," the legislature took it upon itself to determine the entity's guilt and to impose the sanction it deemed appropriate. Brown, 381 U.S. 437, 14 L. Ed. 2d 484, 85 S. Ct. 1707. In short, the

legislature "was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses." Nixon, 433 U.S. at 479. Consequently, the Court finds that the Indian Point Law violates the constitutional prohibition against enacting a bill of attainder.[6] As the Court has determined that it is violative of the Equal Protection Clause and the Bill of Attainder Clause, Defendants are enjoined from taking any action to implement or enforce Chapter 190.

[**34]

IV. Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff's motion for a permanent injunction is GRANTED; it is further

ORDERED that Defendants are enjoined from taking any action to implement or enforce Chapter 190 of the Laws of 2000; it is further

[*271] ORDERFD that Plaintiff's motion for a preliminary injunction is DENIED as moot; and it is further

ORDERED that the Clerk shall serve copies of this Order by United States Mail upon the attorneys for the parties appearing in this action.

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[6] Because this Court determined that the Indian Point Law is unconstitutional on equal protection and bill of attainder grounds, it will not address Plaintiff's other constitutional claims. Furthermore, because the Court has granted a permanent injunction, Plaintiff's motion for a preliminary injunction is denied as moot.

IT IS SO ORDERED.

Hon. Lawrence E. Kahn
United States District Judge

Dated: October 10, 2000
Albany, New York

APPENDIX C

ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

APPENDIX D

D-1

CHAPTER 190 OF THE LAWS OF 2000
LAWS OF NEW YORK, 223RD LEGISLATIVE SESSION
VOLUME III, PAGES 2799-2800

[*2799] AN ACT prohibiting the recovery of costs in connection with a radiation leak at the Indian Point 2 Nuclear Facility on February 15, 2000

Became a law August 8, 2000, with the approval of the Governor.
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Declaration of legislative findings. The operator of a nuclear generating facility has a high duty of care to protect the health, safety and economic interests of its customers. Rate regulation of nuclear operators should discourage the taking of risks with regard to potential threats to public health and safety.

By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers. Therefore it would not be in the public interest for the company [*2800] to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.

§ 2. With respect to the February 15, 2000 outage at the Indian Point 2 Nuclear Facility, the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility. Such prohibition shall apply to any such costs incurred until the

conclusion of such outage, or incurred at any time until all defective steam generation equipment at the facility has been replaced, whichever occurs later. Such prohibition shall apply to automatic adjustment mechanisms as well as base rates or any other rate recovery mechanism. The commission shall order the company to refund any such costs which have been recovered from ratepayers.

§ 3. This act shall take effect immediately.

APPENDIX E

§ 11. Powers

Every such corporation shall have the following powers:

1. A gas corporation and a gas and electric corporation shall have power to manufacture gas, and to acquire natural or artificial gas and to mix the gases and to sell and furnish gas for light, heat or power; and to lay conductors for gas in the streets, highways and public places, in each city, village and town in the county or counties named in its certificate of incorporation, with the consent of the municipal authorities of such city, village or town, and under such reasonable regulations as they may prescribe.

2. Every corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing natural gas, may acquire and supply for public use artificial gas.

Where any gas corporation is serving natural gas under permits or franchises permitting the laying or maintaining of mains or pipes and conveying natural gas, and the supply of natural gas has become inadequate or insufficient to give reasonable service to consumers in the municipalities served by it, such gas corporation may supply artificial gas or a mixture of natural and artificial gases under such permits or franchises.

3. An electric corporation and a gas and electric corporation shall have power to generate, acquire and supply electricity for heat or power in cities, towns and villages within this state, and to light the streets, highways and public places thereof, and the public and private buildings therein; and to make, sell or lease all machines, instruments, apparatus and other equipments therefore, and for transmitting and distributing electricity, to lay, erect and

construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places in such cities, towns or villages, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe.

3-a. An electric corporation and a gas corporation shall have power and authority to acquire such real estate as may be necessary for its corporate purposes and the right of way through any property in the manner prescribed by the eminent domain procedure law.

3-b. The construction, use and maintenance by an electric corporation of transmission, distribution and service lines and wires in, over or under any street, highway or public place and the construction, use and maintenance by a gas corporation of transmission, distribution and service pipes, conduits, ducts or other fixtures in, over or under any trees, highway or public place, as may be necessary for its corporate purposes, are hereby declared to be public uses and purposes.

Where any person or corporation other than the state, a political subdivision thereof, or a municipality is the owner of any right, title or interest in or to any street, highway or public place, or in or to the land on which the street, highway or public place is located, an electric corporation or a gas corporation is hereby authorized and empowered to acquire the right to construct, use and maintain such lines or wires and such pipes, conduits, ducts or other fixtures, in, over or under such street, highway or public place, from such owner or owners, by petition in the manner prescribed by section four hundred two of the eminent domain procedure law to the supreme court in the county in which such street, highway or public place is situated. The corporation shall file with the court a certificate of the public service commission certifying that the right sought to be acquired is necessary and in the public interest and such

certificate shall be conclusive evidence as to the matters lawfully certified therein.

After a hearing on such petition and any answer thereto, if the court shall find that such right to construct, use and maintain is necessary for the corporate purposes of the corporation, it shall enter its judgment adjudging that such right is necessary for the public use and that the corporation is entitled to construct, use and maintain its lines or wires or pipes, conduits, ducts or other fixtures in, over or under such street, highway or public place and adjudging pursuant to the eminent domain procedure law the compensation to be made by the corporation to the owner or owners.

4. Any two or more domestic gas corporations, electric corporations, gas and electric corporations, and any other domestic corporations formed for the purpose of engaging in any business in which domestic gas corporations, electric corporations or gas and electric corporations may engage, may merge or consolidate in accordance with the procedure and with the effect set forth in article nine of the business corporation law.

5. A corporation mentioned in this article or incorporated under or by any general or special law of this state for the purpose of supplying for public use electricity for light, heat or power in cities, towns or villages in this state, upon filing a certificate of amendment therefor, to which is annexed the consent required by section one hundred and eleven of this chapter, shall have all the rights, privileges and powers and be subject to all the restrictions of district steam corporations.

6. The term "municipal authorities" as used in subdivisions one and three of this section, shall be deemed to be the local legislative body of a city, the board of trustees of a village and the town board of a town. All consents in writing for the doing of acts mentioned in such subdivisions given before April fourteenth, nineteen hundred and

twenty-two, in writing by the highway commissioners or town superintendent of highways or the town board of any town to any corporation organized under the provisions of this article shall be deemed to be the consents of municipal authorities required by this section.

Nos. 02-358 and 02-475

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GEORGE E. PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

RICHARD L. BRODSKY, New York State Assembly Member,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Counter-Statement of Questions Presented

1. Does the Bill of Attainder Clause apply to corporations, as every court that has considered the issue has held or assumed?

2. Did the courts below correctly find that the Indian Point Law (Chapter 190 of the New York Laws of 2000) imposed punishment, where (among other things) the deprivation mandated by the law was more than double the total amount of additional costs caused by the alleged imprudence, and the Senate sponsor of the law proclaimed that "[my] Law is going to stop them and punish them"?

3. Independently of the Bill of Attainder Clause, was the Indian Point Law also invalid as (a) a denial of equal protection, (b) a denial of procedural due process, (c) an attempt to regulate nuclear health and safety that was preempted by the Atomic Energy Act, and (d) a violation of the Contract Clause?

Statement Pursuant to Supreme Court Rule 29.6

Respondent Consolidated Edison Company of New York, Inc. is a wholly-owned subsidiary of Consolidated Edison, Inc., a publicly held company. There is no other publicly held company that owns 10% or more of respondent's stock.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Before the Court are two petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for

the Second Circuit, filed by Governor George E. Pataki, *et al.* ("Pataki Pet.") and New York State Assembly Member Richard L. Brodsky ("Brodsky Pet."). The petitions should be denied. Contrary to petitioners' arguments, the decision below is not in conflict with any decision of this or any other court. Rather, the court of appeals carefully applied the standards articulated by this Court under the Bill of Attainder Clause to the facts in the record, most of which are omitted from the petitions.

Counter-Statement of the Case

A. The Rates Set by the New York State Public Service Commission ("PSC") Which Authorized Con Edison to Recover Replacement Power Costs Unless the PSC Found Imprudence After a Hearing

The New York State Public Service Commission ("PSC") regulates intrastate electric utility service in New York pursuant to the New York State Public Service Law. *See* N.Y. Public Service Law §§ 64-77. The Public Service Law is a comprehensive regulatory scheme which "encompasses virtually all aspects of the [utility] business." *Capital Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154, 1160 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985). The New York courts have repeatedly emphasized the breadth of the Legislature's delegation of power to the PSC. *See, e.g., Niagara Mohawk Power Corp. v. PSC*, 69 N.Y.2d 365, 369, 507 N.E.2d 287, 289, 514 N.Y.S.2d 694, 696 (1987).[1]

In setting rates, the PSC has the power to disallow recovery

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[1] The enactment of the Public Service Law followed the New York State Legislature's recognition that it was impracticable for it to set rates individually for all of the various localities and types of utilities in the state. *See Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N.Y. 123, 143-44, 83 N.E. 693, 699 (1908).

of utility expenditures caused by imprudence, but this power is subject to both substantive and procedural safeguards. As a substantive matter, a finding of imprudence cannot be based on 20/20 hindsight, but can only be made if the utility acted unreasonably based on the circumstances as they existed at the time it acted. *Long Island Lighting Co. v. PSC*, 134 A.D.2d 135, 143-44, 523 N.Y.S.2d 615, 620 (3d Dep't 1987). Procedurally, it is necessary "to demonstrate a tenable basis for raising the specter of imprudence before the utility can be called upon to defend its conduct," *id.* at 144, 523 N.Y.S.2d at 620, and the utility has a right to an evidentiary hearing on the issue of imprudence, followed by a reasoned determination by the PSC which is subject to judicial review under Article 78 of New York's Civil Practice Law and Rules ("CPLR"). *See, e.g.*, N.Y. Public Service Law § 72. As the PSC acknowledged in this case (A1379),[2] the issue of imprudence is an adjudicatory issue, akin to the issue of fault in an ordinary civil case. *See, e.g., Long Island Lighting Co. v. Imo Indus. Inc.*, 6 F.3d 876, 885-86 (2d Cir. 1993).

Fuel adjustment clauses ("FACs") are used to adjust rates automatically for changes in the costs of fuel and purchased power and other expenses whose level is subject to fluctuation (A128-A129). The PSC has approved the use of FACs in utility tariffs since 1917. *Niagara Mohawk Power Corp. v. PSC, supra*, 69 N.Y.2d at 370, 507 N.E.2d at 290, 514 N.Y.S.2d at 697. A 1981 statute confirmed the PSC's power to review for imprudence the charges that had been passed on pursuant to FACs. L. 1981, c. 304, adding N.Y. Public Service Law § 66(12)(k). This statute recognized and "in no way change[d] the important safeguards of due process for the utilities already set forth in the Public Service Law." Memorandum for the Governor From Attorney General Robert Abrams, June 23, 1981, at 3, in

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[2] "A" citations are to the joint appendix in the court of appeals.

Governor's Bill Jacket for L. 1981, c. 304.

In a number of proceedings over the years, the PSC has considered the prudence of replacement power costs associated with nuclear plant outages. These proceedings have established several important principles. First, the standard of imprudence in cases dealing with nuclear plant outages is the same standard that applies in imprudence proceedings generally – reasonableness under the circumstances as they existed at the time the utility acted. *See, e.g., Niagara Mohawk Power Corp.*, 24 N.Y.P.S.C. 6205, 6211 & n.1, 6226 (1984); *Consolidated Edison Co.*, 22 N.Y.P.S.C. 98, 105-08 (1982). Second, even where imprudence is found, no disallowance will be made for those portions of outages that would have been necessary in any event for maintenance, refueling, or installation of new equipment. *See, e.g., Niagara Mohawk Power Corp.*, 31 N.Y.P.S.C. 1745, 1765-68 (1991); *Consolidated Edison Co.*, 34 N.Y.P.S.C. 663, 678 (1994). Finally, the PSC's consideration of this issue has included all of the procedural safeguards which apply in imprudence proceedings generally. *See, e.g., Niagara Mohawk Power Corp., supra*, 24 N.Y.P.S.C. at 6209.

During the relevant period, the electric rates of respondent Consolidated Edison Company of New York, Inc. ("Con Edison") were fixed by an agreement entered into by Con Edison, the PSC staff, the New York State Department of Law, and many other parties (A427-A546), which was approved by the PSC in 1997 (A417-A425, A553-A669). This agreement provided for rate reductions of more than $1.1 billion (A441-A443), as well as the divestiture of Con Edison's fossil fuel generating plants (A477-A479). As part of the overall agreement between the parties, the agreement provided that Con Edison would recover through the FAC the cost of purchasing energy in the volatile and now unregulated wholesale market (A158-A166, A467-A468, A1359). The FAC expressly provided that cost increases or savings relating to the operation of

Con Edison's Indian Point 2 nuclear plant would be charged or credited to customers through the FAC, except that Con Edison would retain or bear 30% of such cost changes up to a maximum of $10 million per year (A130-A131, A163).[3]

B. The Indian Point 2 Nuclear Plant and the February 2000 Outage

Beginning in 1974, Con Edison operated the Indian Point 2 nuclear power plant ("Indian Point 2") in Westchester County, New York (A30). Indian Point 2 is a pressurized water reactor plant, in which hot, pressurized, radioactive primary water from the nuclear reactor vessel is pumped through tubes in four steam generators, where it is used to vaporize nonradioactive secondary water into steam which is used to generate electricity (A40-A41, A267-A268).

Westinghouse manufactured two models of steam generators (Models 44 and 51) that had tubes made of the same metal alloy, Inconel 600 (A41, A726-A727). Westinghouse delivered these models to approximately 30 nuclear plants in the United States (A42). In the 1970s, it was discovered that Inconel 600 was susceptible to corrosion in certain environments (A41, A727). As a result, Con Edison and many other utilities sued Westinghouse. *See, e.g., Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 567 F. Supp. 358, 360 (S.D.N.Y. 1983).

Because petitioner Brodsky wrongly claims that it is "undisputed" that Con Edison was negligent in not replacing the steam generators sooner than it did (Brodsky Pet. 27), it is important to note that Con Edison carefully considered whether this would be in the best interests of its customers. Premature installation would have cost customers over $100 million in

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[3] The Brodsky petition asserts that Con Edison was the only New York utility with a fuel adjustment clause covering nuclear plant outages (Brodsky Pet. 3), but this is inaccurate (A673, A1359).

construction costs, plus the cost of purchasing replacement power during the installation (A43). Con Edison, like many other nuclear plant operators, was successful in combating corrosion in the steam generators by making changes in water chemistry and other aspects of plant operation (A42).[4] Indeed, Con Edison's success in stopping the corrosion was used against it by Westinghouse in defending against Con Edison's warranty claim. *See Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 594 F. Supp. 698, 699 (S.D.N.Y. 1984) ("[t]he corrosion of the steam generators at Indian Point Unit 2 is essentially arrested" and "if the current condition of the steam generator continues, the steam generator should serve the life of the plant").

Con Edison's operation of the Indian Point 2 plant, including its steam generators, was subject to extensive regulation by the Nuclear Regulatory Commission ("NRC") (*see* A46-A54). As required by the NRC, the steam generator tubes were inspected by highly trained specialists every two years, and the inspections were reported in detail to the NRC (*see* A43-A44, A1229-A1282).

On February 15, 2000, one of the 13,000 steam generator tubes at Indian Point 2 experienced a two-inch crack, allowing a small quantity of radioactive primary water to leak through the tube wall (A40, A44, A56). The leak was immediately detected, and the plant was manually shut down by the operators (A44, A56-A58). It is undisputed that the incident did not affect the health or safety of any member of the public (A59-

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[4] As of January 1997, approximately 16 of the 30 plants built with Westinghouse Model 44 and 51 steam generators in the United States were still using their original steam generators (A42). Petitioners' statement that Con Edison was the only utility that did not replace the Model 44 steam generators (Pataki Pet. 3; Brodsky Pet. 2) is misleading because it ignores the 15 plants still using Model 51 steam generators, which used the identical Inconel 600 alloy (*see* A1359).

A61, A72). Indeed, the releases represented a small fraction of the normal amount of background radiation (A59-A60).

Shortly after the incident, Con Edison found the leak and plugged the affected tube (A44). During the period from February through June 2000 (a substantial portion of which coincided with a pre-planned refueling and maintenance outage), Con Edison inspected all of the steam generator tubes at Indian Point 2, and reported its findings to the NRC (A44-A45, A1360, A1375). In August 2000, Con Edison decided to install new steam generators before restarting the plant (A37). Following installation of the new steam generators, the plant resumed operations in January 2001.

Because the cost of generating electricity at the Indian Point 2 plant was substantially less than the price of replacement power,[5] the unavailability of the plant during the outage resulted in increased energy costs of about $250 million. It is undisputed in the record that more than half of this amount was attributable to the time required for refueling, maintenance, and installation of the new steam generators, all of which would have been required even if the new steam generators had been installed earlier, as the petitioners argue they should have been (A1360, A1375). Under the legal standards applied by the PSC, the time required for these purposes would not be included in any disallowance (*see* p. 4 *supra*).

C. The PSC's Investigation of the Outage and Its Holding That There Was as Yet No Record Basis for a Finding of Imprudence

Immediately after the February 15, 2000 outage, the PSC staff began to investigate the outage (A55-A69, A213). On

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[5] It is estimated that Con Edison's operation of the Indian Point 2 plant saved customers more than $3 billion in electricity costs since it commenced service in 1974 (A124-A125, A223).

March 30, 2000, the PSC commenced a formal proceeding to investigate the prudence of the outage (A71-A76). The PSC emphasized that the standard of prudence to be applied in the proceeding would be the standard that it had previously applied in such cases, namely, "how reasonable people would have performed the tasks that confronted the company" (A75).

Westchester County petitioned the PSC to suspend the operation of Con Edison's FAC, arguing that Con Edison was imprudent because it was the only utility that had not replaced its Westinghouse Model 44 steam generators (A347-A353) – exactly the argument accepted by the Legislature in the Indian Point Law. The PSC rejected the Westchester County petition (A167-A173). The PSC held that "there is, as yet, no record basis on which one could conclude that there is a substantial likelihood that Con Edison acted imprudently" (A172). The PSC emphasized that Westchester County's argument failed to take account of the established legal standard of imprudence:

> "The unanswered allegations in the Westchester Petition do not address the circumstances existing at the time the decisions were made, nor do they measure those decisions against the 'reasonableness' standard." (*Id.*)[6]

D. The Assembly's Condemnation of Con Edison and Its Passage of the Indian Point Law

On March 3, 2000, three committees of the New York State Assembly held a joint hearing, which was chaired by petitioner Brodsky (A783-A979). Although the Brodsky petition implies that this hearing gave the Legislature a factual basis for the

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[6] Petitioners incorrectly state that the PSC proceeding has been informally stayed during the pendency of this case (Pataki Pet. 5 n.2). In fact, the parties are involved in extensive discovery proceedings, and the filing of testimony is scheduled for February 14, 2003.

Indian Point Law (Brodsky Pet. 3-4), the notice of the hearing did not include any issue relating to imprudence (*see* A215-A217), and at the hearing petitioner Brodsky referred to the subject of imprudence only as an "assumption" that he had "no reason" to think was true:

> "Assume for a second – and I'm putting it out as an assumption – I have no reason to think it's true – but assume that Con Ed itself would have acted negligently in some way with respect to the cause or control of the incident, would that change your legal ability to collect from ratepayers the fuel adjustment charge?" (A919-A920.)

Although petitioner Brodsky had no reason to think Con Edison was imprudent on March 3, 2000, he had changed his mind by March 20, 2000, when he co-sponsored a bill, together with 56 other Assembly members, which declared that "the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers" (A77). The accompanying sponsors' memorandum explained that this finding of imprudence was based on Con Edison's failure to replace its Model 44 steam generators when other nuclear plant operators had replaced theirs (A79) – the exact same rationale which the PSC rejected as incompatible with the established legal standard of imprudence (*see* p. 8 *supra*).

On March 27, 2000, only one week after the bill was introduced, it passed the New York State Assembly by a lopsided vote of 137 to 10 (A1045). Assembly members voting for the bill condemned Con Edison's conduct (*e.g.*, "ConEdison has not kept the safety of the people in the surrounding areas and beyond upper most in their mind" (A89)); stressed safety issues that are within the exclusive jurisdiction of the NRC under the Atomic Energy Act (*e.g.*, "the implications when a plant is not

running safely has great implications for the rest of the State" (A88)); and expressed a lack of confidence in the PSC and the NRC (*e.g.*, "And I would just like to say that the systems that we have in place, be they the PSC, the NRC, ConEdison, they really have not been working for us" (*id.*)).

E. The PSC's Warning That There Was No Factual Basis for the Indian Point Law and That It Was Probably Unconstitutional

At this point, the PSC issued an extraordinary and unprecedented warning to the Legislature about the bill which had already passed the Assembly.

In a letter to members of the Legislature (A81-A82), the PSC stated that there was no factual basis for the bill's finding of imprudence on the part of Con Edison:

> "A. 10096, a bill introduced by Speaker Silver and passed by the Assembly, would prohibit Consolidated Edison from recovering any costs of replacement power. This prohibition is based on a proposed legislative finding that failure to replace IP 2 generators caused increased risk of radioactive leakage or plant outages. Until the investigations and proceedings are completed, there is no basis for such a finding. We, therefore, request that the Assembly recall the bill from the Senate and reconsider its passage pending the Commission's prudence investigation." (A81.)

The PSC further explained that the bill was not needed to fulfill its stated purpose, because the PSC already had the power to disallow imprudent fuel adjustment expenses (A81). Finally, the PSC issued a thinly veiled warning that the bill was probably unconstitutional because of the manner in which it targeted a single incident involving Con Edison (A82).

F. The Senate's Passage of the Indian Point Law and the Senate Sponsor's Avowal of His Intent to Punish Con Edison

The PSC's warning did not deter the New York State Senate from approving the bill by a margin even more lopsided than the Assembly's. On May 24, 2000, the Senate voted 57 to 1 in favor of the bill (A1045-A1046).

Members of the Senate who voted for the bill roundly condemned Con Edison's conduct (*e.g.*, "they choose to do it any way they want" (A96)), and declared that Con Edison should be punished (*e.g.*, "they should certainly be penalized for taking our health and toying with it" (A109)).[7] Especially telling were the statements of the Senate sponsor of the bill, Senator Velella. Senator Velella declared that "Con Edison has done a terrible thing here" and that "they put lives at risk" (A103). What is more, he proclaimed that "Velella's Law is going to stop them and punish them" (A104). It would be hard to imagine a more forthright or emphatic declaration of condemnation and punitive intent.

Governor Pataki approved the bill on August 8, 2000 (A414-A415). In approving the bill, the Governor made clear that he would not normally approve "legislation that usurps the PSC's authority in this area," but he said that he would do so in this "exceptional case" (A415).

On August 9, 2000, the day after the Governor's approval of the Indian Point Law, the PSC issued an order implementing the law (A116-A122). The PSC held that, because the law mandated the disallowance of *all* Indian Point replacement power charges, it could not reduce the disallowance to take

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[7] In fact, both the state and the NRC investigations concluded that there was no offsite release of radioactivity and no risk to the public health (Pataki Pet. 3a).

account of refueling or repair outages (A120), as it normally does (*see* p. 4 *supra*). This alone more than doubled the magnitude of the deprivation (*see* p. 7 *supra*).

G. The Critical Differences Between the Indian Point Law and the Substantive and Procedural Standards of Imprudence Applied in All Other Cases

There are crucial differences between the Indian Point Law and the substantive and procedural standards applied by the PSC in other cases.

Among the substantive differences between the Indian Point Law and the legal standards applicable in all other cases are the following:

- The legal standard of prudence applied by the PSC is a standard of reasonableness based upon the circumstances as they existed at the time the utility acted (*see* pp. 3, 4 *supra*). The Indian Point Law did not apply this standard, but instead was based upon *post hoc* reasoning of a kind which the PSC held did not even establish a substantial likelihood of imprudence in this case (*see* pp. 8, 9 *supra*).

- The PSC has held that no disallowance will be made for outages that would have been necessary in any event for refueling, maintenance, and installation of new equipment (*see* p. 4 *supra*). The Indian Point Law mandated the inclusion of such outages in the disallowance (*see* pp. 11-12 *supra*). As noted above, this alone more than doubled the magnitude of the deprivation (*see* pp. 7, 12 *supra*).

The procedural differences between the Indian Point Law and the legal standards governing the PSC in other cases are equally striking. Among the procedural rights which were denied here are the following:

- The right to notice of the asserted grounds for a finding of

imprudence (*see* pp. 3, 9 *supra*);

- The right to an evidentiary hearing at which the utility is able to present and cross-examine evidence on all issues of imprudence (*see* pp. 3, 9 *supra*); and
- The right to a reasoned decision by the PSC and to judicial review of any disallowance pursuant to Article 78 of the CPLR (*see* pp. 3, 11-12 *supra*).

REASONS FOR DENYING THE WRIT

I. This Case Presents No Issue Calling for Review by This Court

A. There Is No Conflict Among Courts Concerning the Applicability of the Bill of Attainder Clause to Corporations

Petitioners argue that this Court should grant certiorari to settle the issue of the applicability of the Bill of Attainder Clause to corporations (Pataki Pet. 8-17; Brodsky Pet. 19-29). But there is no conflict on this issue for this Court to resolve.

Every court that has considered the issue has held or assumed that the Bill of Attainder Clause applies to corporations – an assumption which has typically been shared by all of the parties before them, despite the fact that they disagreed sharply on the other issues raised.[8] No court has ever suggested that the Bill

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[8] *See, e.g., Club Misty, Inc. v. Laski*, 208 F.3d 615, 617 (7th Cir.) (assuming, without deciding, that corporations as well as individuals are protected by the Bill of Attainder Clause), *cert. denied*, 531 U.S. 1011 (2000); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1065 (D.C. Cir. 1999) (stating that a bill of attainder is a law that "specifically singles out individuals (or businesses) and imposes punishment on them"), *cert. denied*, 531 U.S. 816 (2000); *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) (parties assumed "that the Bill of Attainder Clause protects corporations as well as individuals"); *SBC Communications, Inc. v. FCC*, 154 F.3d

of Attainder Clause does not apply to corporations.

In light of this broad consensus on the issue, there is simply no conflict calling for resolution by this Court.[9] It will be time enough for this Court to intervene if any court should ever hold that the Bill of Attainder Clause does not apply to corporations.

As the court of appeals noted (Pataki Pet. 12a), this Court has twice indicated that the Bill of Attainder Clause protects corporations and other entities as well as individuals. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid – or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause . . . ."); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (Bill of Attainder Clause protects "individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt").

As this Court explained in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978), the only constitutional provisions that do not extend to corporations are those "'purely personal' guarantees" whose "'historic function' has been limited to the protection of individuals," such as the privilege against self-incrimination. The Bill of Attainder Clause is not

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226, 234 & n.11 (5th Cir. 1998) (assuming "that the Bill of Attainder Clause applies to corporations" and citing six similar constitutional provisions which have been applied to corporations), *cert. denied*, 525 U.S. 1113 (1999); *BellSouth Corp. v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998) ("We assume, as do the parties, that the Bill of Attainder Clause protects corporations as well as individuals"), *cert. denied*, 526 U.S. 1086 (1999).

[9] The strength of the consensus that exists on this issue is indicated by the fact that the petitioners' argument that the Bill of Attainder Clause does not apply to corporations represents an afterthought on their part. None of the petitioners made this argument in the district court (*see* Pataki Pet. 43a n.4), and petitioner Brodsky was the only petitioner who advanced the argument in the court of appeals (*see* Pataki Pet. 8-9 n.4).

such a "purely personal guarantee."

"To prohibit legislative Acts 'contrary to the first principles of the social compact and to every principle of sound legislation,' the Framers included provisions they considered to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains.'" *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (quoting The Federalist No. 44, at 282 (C. Rossiter ed. 1961) (J. Madison) and *id.* No. 84, at 511 (A. Hamilton)). These provisions, all embodied in Article I, § 10 of the Constitution, are the Bill of Attainder Clause, the *Ex Post Facto* Clause, and the Contract Clause. *Carmell v. Texas*, *supra*, 529 U.S. at 521; *see also, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810). The Bill of Attainder Clause, like "its textual and conceptual neighbor" the *Ex Post Facto* Clause, "aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." *Carmell v. Texas*, *supra*, 529 U.S. at 566 (Ginsburg, *J.*, dissenting); *see also, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-25 (1866).

Thus the Bill of Attainder Clause, like the *Ex Post Facto* Clause and the Contract Clause, is a limitation on legislative power, not a purely personal right. For this reason, this Court has repeatedly entertained claims by corporations under the *Ex Post Facto* Clause[10] and under the Contract Clause.[11] By the same token, corporations are entitled to invoke the protections of the Bill of Attainder Clause.

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[10] *See, e.g., Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 73-74 (1915); *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 152-53 (1911); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 107-08 (1909).

[11] *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186-91 (1992); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-19 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250-51 (1978).

That the Bill of Attainder Clause is not merely a personal right is also clear from the text of the Constitution itself. The Constitution does not say merely that individuals have a right not to be victimized by bills of attainder. Instead, it says, categorically and without exception, that "[n]o State shall . . . pass *any* Bill of Attainder . . . ." U.S. Const., Art. I, § 10 (emphasis supplied). It follows that any victim of a bill of attainder – whether a natural or a juridical person – may invoke the constitutional prohibition.

The teaching of history is to the same effect. Historically, bills of attainder have been directed not only against individuals, but also against groups and against corporate entities such as boroughs.[12] And this Court has struck down bills of attainder directed against groups, as well as against named individuals. *See, e.g., United States v. Brown*, 381 U.S. 437, 461 (1965) (striking down bill of attainder directed against the Communist Party); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-35 (1866) (striking down bill of attainder directed against ex-Confederates).[13] There is no reason why the constitutional protection against being singled out for punishment without the safeguards of a judicial trial should not apply to all.

For all these reasons, there is no need for this Court to take up the issue of the applicability of the Bill of Attainder Clause

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[12] *See, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866); *see also, e.g.*, 1 & 2 Geo. 4, c. 47 (1821) (stripping a borough of its seats in Parliament on a finding of bribery and corruption); 22 Geo. 3, c. 31, § 1 (1781) (changing the qualifications for voting in a borough on a finding of bribery and corruption); 11 Geo. 3, c. 55, § 2 (1771) (same).

[13] Petitioners argue that the Bill of Attainder Clause was intended to protect "disfavored" persons (Pataki Pet. 16; Brodsky Pet. 21-23). As the district court observed (with considerable understatement), Con Edison, "although not the prototypical powerless victim of constitutional overreaching by any stretch of the imagination, is clearly politically unpopular" (Pataki Pet. 49a).

to corporations – an issue on which there is no conflict among courts, and on which not a single judge of any court has espoused petitioners' position.

B. The Court of Appeals Correctly Applied the Standards Articulated by This Court Under the Bill of Attainder Clause, and Petitioners' Argument to the Contrary Disregards the Facts Found Below

Petitioners argue that review by this Court is necessary because the court of appeals supposedly departed from the standards articulated by this Court under the Bill of Attainder Clause, and allegedly created a new test focusing on "less burdensome alternatives" (Pataki Pet. 17-25; Brodsky Pet. 8-15).

Nothing could be further from the truth. Petitioners' argument is based on a palpable misreading of the decision of the court of appeals. Far from creating a new legal standard, the court of appeals correctly applied the Bill of Attainder Clause standards set forth by this Court in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), to the facts it found based on the uncontradicted record in this case.

The three essential elements of a bill of attainder, as defined by this Court, are "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group, supra*, 468 U.S. at 847.

Petitioners do not dispute (*see* Pataki Pet. 7; Brodsky Pet. 6) that the first and third elements of a bill of attainder – "specification of the affected persons" and "lack of a judicial trial" – are present in this case, as both courts below found (Pataki Pet.

10a, 16a-17a, 46a). The sole element disputed by petitioners is whether the Indian Point Law imposed "punishment," as both courts below also found (Pataki Pet. 17a-28a, 47a-54a).

This Court has formulated a tripartite inquiry for use in assessing whether a statute imposes punishment within the meaning of the Bill of Attainder Clause:

> "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Service System v. Minnesota Public Interest Research Group, supra*, 468 U.S. at 852 (quoting *Nixon v. Administrator of General Services, supra*, 433 U.S. at 473, 475-76, 478).

These factors are to be weighed together in determining whether a statute imposes punishment, and it is not essential that all three factors be satisfied. *See Nixon v. Administrator of General Services, supra*, 433 U.S. at 475-76.

The court of appeals carefully weighed each of the three factors identified by this Court (Pataki Pet. 19a-28a). Petitioners assert that the court found that the first and third factors were not satisfied (Pataki Pet. 18; Brodsky Pet. 7, 12), but this is not so. Rather, the court held that it did not need to decide whether the historical test was met because the functional test was clearly satisfied (Pataki Pet. 20a). And, while the court stated that it did not rely on the evidence of legislative intent alone, it found that some legislators (including the Senate sponsor of the law) "unquestionably intended to punish Con Ed," and that this reinforced its independent conclusion based on the functional test (Pataki Pet. 28a).

Addressing the functional test, the court of appeals stressed – as had the district court (Pataki Pet. 53a) – that the record showed that a "quite substantial proportion" of the costs that the Legislature disallowed by the Indian Point Law would have been incurred even if the steam generators had been replaced earlier, and that their disallowance therefore could not be said to serve a compensatory function (Pataki Pet. 24a-27a).[14] Petitioners argue that the court of appeals thereby required "a *precise* fit" between the statute and its supposedly compensatory goals (Pataki Pet. 20; emphasis in original).

This argument is flatly contrary to the record facts. The record established that 60% of the total period of the outage – that is, $150 million of the total deprivation of $250 million mandated by the law – was accounted for by a pre-planned refueling and maintenance outage and by the installation of the new steam generators, both of which would have taken place even if the steam generators had been installed earlier (A1360, A1375). *The petitioners did not contest this crucial fact*; indeed, they waived an evidentiary hearing in the district court (Pataki Pet. 6). Thus, far from requiring a "*precise* fit" between the law and the quantum of compensatory damages, the court below simply made the obvious finding, based on the uncontradicted record, that a deprivation that exceeded compensatory damages by roughly $150 million imposed punishment (Pataki Pet. 25a-26a).

In so finding, the court of appeals followed the teaching of this Court in *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 482, that "[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives."

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[14] These are precisely the costs that would not have been disallowed by the PSC even if it had made a finding of imprudence (*see* p. 4 *supra*), but whose disallowance was mandated by the Legislature (*see* pp. 11-12 *supra*).

While the petitioners try to argue that this statement applied only to the purpose test (Pataki Pet. 22-23; Brodsky Pet. 13), this Court made clear in *Nixon* that the same principle applies to the functional test. *See Nixon, supra*, 433 U.S. at 475-76 (in applying the functional test, the law under challenge must be "viewed in terms of the type *and severity* of burdens imposed" (emphasis supplied)). Thus the court of appeals did not create a new "less burdensome alternatives" test, but simply applied the teaching of this Court that a law that imposes a deprivation of property going far beyond compensation must be viewed as imposing punishment.

Thus petitioners' argument that the court of appeals applied a new "less burdensome alternatives" test is founded on a misreading of the decision below and of this Court's decision in *Nixon*, and is contrary to the uncontradicted facts established by the record in this case.[15]

C. The Decision Below Will Not Result in the Ruinous Consequences Predicted by Petitioners, Because the Indian Point Law Is – for Good Reason – Literally Unique in the Annals of American Jurisprudence

Petitioners vie with each other to predict disastrous consequences if the decision below is not reversed, saying, for example, that it will "expose numerous laws regulating businesses to constitutional challenge" (Pataki Pet. 12), and that it will "endanger economic regulatory decisions made by legisla-

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[15] Petitioners try to manufacture a conflict between the holding of the court below and the statement of the District of Columbia Circuit in *BellSouth Corp. v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998), that "it does not matter that Congress arguably could have enacted different legislation" (Pataki Pet. 24; Brodsky Pet. 9, 10), but there is no such conflict, because the *BellSouth* court was not confronted with a statute that imposed a deprivation of property that was concededly far in excess of compensatory damages.

tive bodies across the nation" (Brodsky Pet. 14). There is no basis for these hyperbolic claims.

The fact is that the Indian Point Law is literally unique in the annals of American jurisprudence. Petitioners have cited – and we have found – no other case since the ratification of the Constitution in which a legislative body has (1) tried and determined the issue whether a specific person was at fault in connection with a specific past occurrence, (2) imposed a deprivation far exceeding the amount of compensation, and, to make matters worse, (3) retrospectively applied different substantive standards than those applicable to all other persons and occurrences.[16] Only a law that does all of these things – or at least the first two of them – has anything to fear from the decision below. The court of appeals rightly stressed "the extraordinary scarcity of legislation of [this] type" which is not only "so exceptionally narrow in scope," but also "manifestly retrospective in focus, and unavoidably punitive in operation" (Pataki Pet. 29a).

In particular, contrary to petitioners' argument (Pataki Pet. 25-26; Brodsky Pet. 16-18), the decision below does not threaten the legislative power to set utility rates which this Court reaffirmed in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989). As the court of appeals correctly emphasized (Pataki Pet. 17a), the Indian Point Law was not a prospective measure setting utility rates for the future, but rather was a retrospective adjudication of Con Edison's supposed imprudence in the context of the electric rates which had already been set by the PSC for Con Edison back in 1997 (*see* pp. 2-3, 4-5

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[16] Before the adoption of the Constitution, as this Court explained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-22 (1995), such instances of legislative overreaching were not uncommon, but it was one of the fundamental goals of the Framers of the Constitution to end such abuses. *See id.* at 222-25; *see also, e.g., Carmell v. Texas*, 529 U.S. 513, 521 (2000).

supra).[17] When these facts are combined with the punitive nature of the deprivation imposed by the law, it becomes obvious that the decision below poses no threat to any legislature that wishes to return to the 19th-century practice of setting utility rates itself. The decision below simply reminds us that, whatever power it purports to exercise, the Bill of Attainder Clause requires a legislature to avoid punitive deprivations based on retrospective adjudications of guilt in individual cases.

II. The Issues Raised by Petitioners Are Not Determinative of This Case, Because the Indian Point Law Is Invalid for Additional Reasons Which Were Not Reached by the Court Below

In addition to the Bill of Attainder Clause, which was the ground on which both courts below invalidated the Indian Point Law, Con Edison also contended below that the law is invalid as (a) a denial of equal protection, (b) a denial of procedural due process, (c) an attempt to regulate nuclear health and safety that is preempted by the Atomic Energy Act, and (d) a violation of the Contract Clause (A22-A27). Although the court of appeals found it unnecessary to reach these additional grounds, their presence makes it even more clear that the issues sought to be raised by petitioners are not determinative of the result in this case.[18]

A. Equal Protection

In addition to finding that the Indian Point Law violated the

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[17] It was conceded below that the Legislature's action here was an adjudication (A1379).

[18] It is well established that a respondent in this Court may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Bill of Attainder Clause, the district court also found that it violated the Equal Protection Clause (Pataki Pet. 35a-42a). The Court of Appeals did not reach this question, although it expressed doubt that the law denied equal protection (Pataki Pet. 8a-9a n.2).

The Indian Point Law singles out a single utility – Con Edison – and a single past incident – the February 2000 outage at Indian Point. This alone does not necessarily mean that the law denies equal protection, because "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). However, a law that defines a "class of one" is not automatically valid either. The question here, as in most equal protection cases, is whether there is a rational basis for having one set of substantive and procedural rules applicable only to Con Edison, and a different set applicable to all other utilities in the state. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The law created two classes of utilities. One class (all other utilities) has substantive and procedural rights with respect to the issue of imprudence (*see* pp. 12-13 *supra*). The other class (Con Edison) has none of these rights (*see id.*).[19] The petitioners argued below that the use of different rules for Con Edison was rational because it was the only utility in the state that still used Westinghouse Model 44 steam generators (Pataki Pet. 39a-40a). But, as the district court pointed out (*id.*), there is no reason why the legal standards governing imprudence should be changed for a single outage merely because the outage involved one type of equipment rather than another.

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[19] The critical importance of these differences is demonstrated by the fact that the very factors which the PSC had held were insufficient to give rise to a substantial likelihood of imprudence formed the basis for the Legislature's finding of imprudence (*see* pp. 8, 9 *supra*).

This case exemplifies the wisdom of Justice Jackson's now-classic observation in his concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949), that "[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *See also, e.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916) (Holmes, *J.*) (if the legislature were to declare a single company presumptively guilty of monopolization, "we suppose that no one would contend that the [company] was given the equal protection of the laws").

B. Procedural Due Process

Procedural due process analysis proceeds in two steps: "we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001) (citation omitted).

As the court of appeals found (Pataki Pet. 20a), the Indian Point Law clearly deprived Con Edison of a property interest, because the FAC in Con Edison's tariff approved by the PSC in 1997 entitled Con Edison to recover a specified portion of the increased energy costs caused by an outage, unless the PSC made a finding of imprudence after a hearing (*see* pp. 2-5 *supra*). "A state-created entitlement that cannot properly be eliminated except for cause is a property right of which the holder may not be deprived without procedural due process." *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987) (citing, *inter alia*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985)). Indeed, a utility's due process right to a hearing on the issue of imprudence has been expressly recognized by the New York State Attorney General (*see* pp. 3-4 *supra*).

In *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245

(1973), this Court, after reviewing its prior decisions, formulated the following general standard differentiating the policy-type proceedings in which no hearing is required by due process from the quasi-adjudicatory proceedings in which a hearing is required:

> "[T]hese decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."

The issue of imprudence raised in this case is quintessentially a quasi-adjudicatory issue on which a hearing is required, because it is a "proceeding[] designed to adjudicate disputed facts in [a] particular case[]." As the PSC admitted below, "[t]his was an adjudicatory act" (A1379). New York law explicitly recognizes the utility's right to an evidentiary hearing on this issue (*see* pp. 3-4 *supra*).

The procedures followed by the State Legislature in enacting the Indian Point Law clearly did not comport with due process, as both courts below found (Pataki Pet. 10a, 46a). The law thus violated Con Edison's due process rights.

C. Atomic Energy Act Preemption

As the court of appeals noted (Pataki Pet. 23a-24a), "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Therefore, state regulation of nuclear power plant safety is preempted if *either* the purpose *or* the effect of the state regulation is to regulate nuclear power plant safety. *See, e.g., English v. General Elec. Co.*, 496 U.S. 72, 84 (1990). The

Indian Point Law is preempted under both of these tests.

First, the Indian Point Law proclaimed on its face its purpose to regulate nuclear power plant safety, saying, for example, that "[r]ate regulation of nuclear operators should discourage the taking of risks with regard to *potential threats to public health and safety*" (Pataki Pet. 2; emphasis supplied). Both the Assembly and the Senate debates contained repeated accusations that Con Edison had endangered the public health and safety, despite the undisputed fact that the February 2000 leak did not result in any such danger (*see* pp. 6-7 *supra*). *See, e.g.*, A89 ("ConEdison has not kept the safety of the people in the surrounding areas and beyond upper most in their mind"); A109 ("they should certainly be penalized for taking our health and toying with it"). Thus the Indian Point Law clearly had the forbidden purpose to regulate nuclear power plant safety.[20]

Second, any state statute that "seek[s] to regulate the construction or operation of a nuclear powerplant" is preempted because, "even if enacted out of non-safety concerns, [it] would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, supra*, 461 U.S. at 212. In the present case, the Indian Point Law effectively mandated the replacement of the existing steam generators, whether or not their use was consistent with the NRC's regulations and directives, by the simple but effective device of disallowing all replacement power costs "until the conclusion of such outage, *or incurred at any time until all defective steam generation equipment at the facility has*

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[20] The petitioners argued below that the law would be valid if it had an economic purpose as well as a safety purpose, but comparable questions have been addressed by this Court under other federal statutory schemes, and have been answered in the negative. *See, e.g., Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 104-08 (1992); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

been replaced, whichever occurs later" (Pataki Pet. 2; emphasis supplied). Thus the Indian Point Law is preempted for this reason as well.

D. Contract Clause

The Contract Clause of the Constitution – which, like the Bill of Attainder Clause, is found in Article I, § 10 (*see* p. 15 *supra*) – provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Whether a state law violates the Contract Clause is determined by a three-step analysis, which asks in turn: (1) whether the law is a substantial impairment of a contract; (2) whether it serves a significant and legitimate public purpose, such as remedying a general social or economic problem; and, if such a public purpose is established, (3) whether the means chosen to accomplish the purpose are reasonable and appropriate. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242-44 (1978).

The substantial impairment inquiry has three subparts: (1) whether there is a contract; (2) whether the law impairs the contract; and (3) whether the impairment is substantial. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). The agreement approved by the PSC in 1997, which fixed the rates for Con Edison during the relevant period after reflecting rate reductions of more than $1.1 billion (*see* pp. 4-5 *supra*), plainly fits within the definition of a contract as "a bargained-for exchange between the parties," *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 67, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978), because it was the product of lengthy negotiations in which Con Edison made very significant concessions in return for, among other things, an FAC to protect against the vicissitudes of the newly volatile energy

market (*see* pp. 4-5 *supra*).[21] Clearly, the Indian Point Law substantially impaired Con Edison's rights under the agreement, because it swept away $250 million in replacement power costs to which Con Edison was entitled under the agreement.

If a substantial impairment of contract is to be upheld despite the Contract Clause, there must be "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at 411-12 (citation omitted). In applying this requirement, this Court has distinguished between generally applicable legislation and legislation singling out a narrow category of persons for distinct treatment. *See, e.g., Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at 248-49. The Indian Point Law bears no resemblance to the statutes that have been held to serve a broad societal interest. On the contrary, it is narrowly focused upon a single occurrence and a single utility. As the PSC told the Legislature, it "prohibits Con Edison, *but no other utility*, from recovering power replacement costs – *even if they are found prudent*" (A82; emphasis supplied). Therefore, the law does not serve a substantial public purpose within the meaning of the Contract Clause.

Even if legislation has a significant public purpose – which was not the case here – courts must still determine whether the means chosen to achieve the goal were reasonable in light of, among other things, less drastic alternatives. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31 (1977). Here, the Legislature clearly had a less drastic alterna-

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[21] A long line of federal cases has held that settlement agreements between utilities and their regulatory commissions are binding contracts. *See, e.g., Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963). The PSC argued below that this is not true of settlement agreements approved by it, but no New York case so holds.

tive: to rely upon the PSC to perform its historic role of adjudicating a claim of imprudence. Since a generally applicable means for protecting the public interest without impairing contract rights was available, the Indian Point Law was unnecessary to advance a legitimate public purpose, and therefore violated the Contract Clause.

CONCLUSION

For the reasons set forth above, the petitions for a writ of certiorari should be denied.

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Respectfully submitted,

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